

# **But She Spoke in an Un-ladylike Fashion!: Parsing through the Standards of Evidentiary Admissibility in Civil Lawsuits after the 1994 Amendments to the Rape Shield Law**

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## **I. INTRODUCTION**

Sexual harassment . . . is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.<sup>1</sup>

The United States Supreme Court used these forceful and commanding words a little less than twenty-two years ago in *Meritor Savings Bank, FSB v. Vinson*. In this landmark decision, the Court declared that unwelcome sexual advances that create a hostile working environment constitute sexual harassment and a viable cause of action under Title VII of the Civil Rights Act of 1964.<sup>2</sup> Nevertheless, today, more than two decades later, sexual harassment in the workplace remains a prevalent and largely unreported problem<sup>3</sup> despite the serious, negative, psychological effects it has on

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<sup>1</sup> *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citation omitted).

<sup>2</sup> *Id.*; see also 42 U.S.C. § 2000e-2(a)(1) (2006) (making it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”).

<sup>3</sup> MARY WELEK ATWELL, *EQUAL PROTECTION OF THE LAW? GENDER AND JUSTICE IN THE UNITED STATES* 85 (David A. Schultz, Christina Dejong, & Gregg Barak, ed., Peter Lang Publishing Inc. 2007) [hereinafter ATWELL, *EQUAL PROTECTION*] (explaining that while about half of the victims of sexual harassment try to avoid their harassers, only a small minority lodge a formal complaint); Louise F. Fitzgerald, Kimberly T. Schneider, & Suzanne Swan, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence From Two Organizations*, 82 J. APP. PSYCHOL. 401, 403 (1997) [hereinafter Fitzgerald, Schneider, & Swan, *Job-Related*] (explaining that only a

working women<sup>4</sup> and men.<sup>5</sup> In fact, research shows that even at relatively

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few women lodge formal complaints about ongoing harassment, and that it is most likely these women instead “react in alternative ways that are included in the construct of organizational withdrawal” such as “absenteeism, tardiness, and other unfavorable job behaviors”); Margaret Moore Jackson, *A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment*, 81 N.D. L. REV. 739, 761 (2005) (commenting that women who are victims of sexual harassment “tend to use less assertive responses to handle the harassment without disrupting work routines or relationships” and usually ignore or avoid the behavior); Lisa Tolin, *Harassment Case Reflects ‘Climate’ Change*, SEATTLE POST-INTELLIGENCER, October 4, 2007, available at [http://seattlepi.nwsource.com/lifestyle/334328\\_harass05.html](http://seattlepi.nwsource.com/lifestyle/334328_harass05.html) (reporting that, “[w]hile the drop in the number of [sexual harassment] cases . . . could be considered good news, experts say . . . that workplace harassment is still a serious and underreported problem. . . . [and] many women don’t report harassment because they fear losing their jobs”).

<sup>4</sup> *Harsco Corp. v. Renner*, 475 F.3d 1179, 1184 (10th Cir. 2007) (reporting the results of repeated sexual harassment: “the effect of the harassment was debilitating: Ms. Renner [plaintiff] . . . experienced psychological distress”); Judith A. Richman, et al., *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 AM J. PUB. HEALTH 358, 358, 361 (1999) [hereinafter Richman, *Mental Health Correlates*] (describing “sexual harassment as a major social problem” “which [is] significantly associated with a diverse range of negative mental health outcomes”).

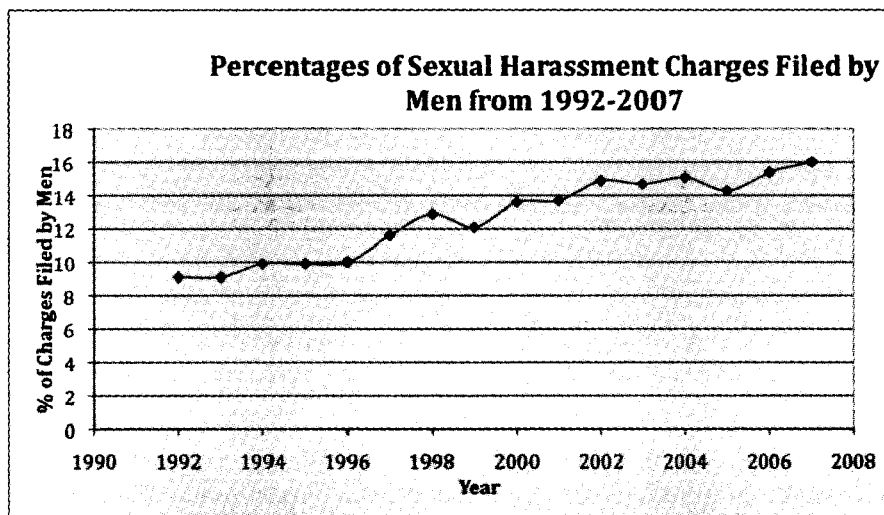
<sup>5</sup> Before proceeding further, it is important to comment that throughout the body of this Note, victims of sexual harassment will frequently be referred to in the feminine gender, while defendants or harassers will be referred to in the masculine gender. However, men are often victims of sexual harassment as well. According to the Equal Opportunity Employment Commission (EEOC), in 2005, 2006, and 2007, of the total number of charge receipts alleging sexual harassment discrimination filed and resolved with the EEOC and the state and local Fair Employment Practices agencies around the country, 14.3%, 15.4%, and 16%, respectively, were filed by men. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SEXUAL HARASSMENT CHARGES EEOC & FEPA’S COMBINED: FY 1997–FY 2007, <http://www.eeoc.gov/stats/harass.html>. It is also interesting to note that the number of charges filed by men has been increasing steadily. In 1992, 1993, and 1994, only 9.1%, 9.1%, and 9.9%, of charges filed and resolved, were filed by men. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: SEXUAL HARASSMENT CHARGES EEOC & FEPA’S COMBINED: FY 1992–FY 1996, <http://www.eeoc.gov/stats/harass-a.html>. Furthermore, in 1998, the United States Supreme Court held that same-sex sexual harassment was actionable sex discrimination under Title VII. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 82 (1998). Male victims, like female victims, have fears regarding the consequences of reporting sexual misconduct and the potential ramifications of filing a formal charge, including having their personal lives exposed during depositions and trial. See Elizabeth J. Kramer, Note, *When Men are Victims: Applying Rape Shield Laws to Make Same-Sex Rape*, 73 N.Y.U. L. Rev. 293, 293, 296–97 (1998) (discussing the application of the rape shield law to cases of male same-sex rape). However, if 14.3%, 15.4%, and 16% of charges filed and resolved were filed by men in 2005, 2006, and 2007, then 85.7%, 84.6%, and 84% of charges filed and resolved were filed by women. Because the vast majority of sexual

low frequencies, sexual harassment has a negative impact on psychological well-being, job attitudes, and work-behavior.<sup>6</sup>

Consider the following example that demonstrates a common sexual harassment reporting dilemma victims face. A law school dean was charged with professional misconduct for having sexually harassed four women employees, two of whom were law students. The victims were asked why they had failed to report the misconduct when it occurred or shortly

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harassment claims are filed by women, and scholarship written on the matter largely refers to a victim in the effeminate, this Note will also use the feminine gender when referring to plaintiffs in sexual harassment cases. *See also* JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT* 87 (Holmes & Meier Publishers, Inc. 3d ed. 2002) (1991) [hereinafter BAER, *WOMEN IN AMERICAN LAW*] (explaining that “sexual harassment has largely been a woman’s problem”); Fitzgerald, Schneider, & Swan, *Job-Related*, *supra* note 3, at 404 n.1 (explaining that because research has clearly indicated that a larger number of women experience sexual harassment than men, and because women perceive sexual harassment differently than men, their study reports data from only female participants); Casey J. Wood, Note, “*Inviting Sexual Harassment*”: *The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 *BRANDEIS L.J.* 423, 423 (2000) [hereinafter Wood, *Inviting Sexual Harassment*] (using the feminine gender throughout the Note, but explaining that it “is not intended to reflect sexist behavior, but rather reality”).



<sup>6</sup> Fitzgerald, Schneider, & Swan, *Job-Related*, *supra* note 3, at 412–13 (warning that sexual harassment claims should not be dismissed by managers because even when misconduct is experienced at relatively infrequent levels, the victim may be “experiencing negative effects compared with those women who have not experienced harassment”).

thereafter.<sup>7</sup> One of the women—a law student who later became a member of the law review, graduated with honors, and worked in a large metropolitan firm—replied as follows: “Professional suicide. It would have probably ruined my career. [The Dean] was a powerful man with a lot of influential friends. I couldn’t take the risk.”<sup>8</sup> Another woman who had been subjected to the harassment responded with similar sentiment: “I felt that there would be strong repercussions that could potentially harm, disgrace or end my career. . . . I just wanted to get another job and get out without—without [sic] having to confront him directly and ruin my career.”<sup>9</sup> The rationale expressed by these women has been echoed by other victims of sexual harassment—most of whom simply avoid their harasser and tolerate any further misconduct.<sup>10</sup>

In addition to fears about losing their careers, another factor deterring

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<sup>7</sup> *Matter of Discipline of Peters*, 428 N.W.2d 375, 376–77 (Minn. 1988) (charging a harasser with professional misconduct for engaging in unwelcome physical contact and sexual verbal communication).

<sup>8</sup> *Id.* at 377.

<sup>9</sup> *Id.*

<sup>10</sup> See *Meritor*, 477 U.S. at 61 (noting that Vinson testified that she never reported the ongoing misconduct or attempted to use the bank’s compliant procedure because she was afraid of her supervisor who was harassing her); *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991) (noting that, when asked why she did not complain about or report alleged sexual harassment, the plaintiff explained that she believed keeping quiet was necessary to maintain her career); *Stoeckel v. Env’tl. Mgmt. Sys.*, 882 F. Supp. 1106, 1110 (D.D.C. 1995) (focusing on the fact that plaintiff “never told [her alleged harasser] to stop making comments or to stop touching her; rather, she would move out of the way or leave the area and avoid Miller whenever possible” and criticizing the plaintiff for taking a week to report a certain incident of misconduct to her supervisor); ATWELL, EQUAL PROTECTION, *supra* note 3, at 85 (citing Louise F. Fitzgerald, Suzanne Swan, & Karla Fischer, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. OF SOCIAL ISSUES 117, 119–21 (1995)) (noting that in one study military women who reported sexual harassment relayed that such revelations had “made their lives worse in every way”); Robert Goffee & Gareth Jones, *Why Should Anyone Be Led by You?* HARV. BUS. REV., 63, 69 (Sept.–Oct. 2000) (explaining that in their research they found that women try to avoid the dynamic of being typecast as “helper,” “nurturer,” or “seductress” by trying to “make themselves invisible” and “wear clothes that disguise their bodies”); Fitzgerald, Schneider, & Swan, *Job-Related*, *supra* note 3, at 403–04 (listing the common coping strategies as “simply tolerating the harassment, denying that it is happening or that it has any effect, reinterpreting the behavior as benign, trying to forget about it, and (less commonly) blaming oneself”); Kate Stone Lombardi, *The New ‘Old Boys’?*, N.Y. TIMES, Jan. 20, 2008, at L1, available at 2008 WLNR 1124090 (explaining that when she began her first job in the late 70s–early 80s: “All of my bosses were male. Several of them made advances, but ‘sexual harassment’ was not yet in the public lexicon, at least not on Capitol Hill. Instead, you ducked away gracefully, taking care not to antagonize the man to whom you still had to report”).

women from coming forward and reporting incidents of misconduct is a general belief that victims of sexual harassment who press charges against their harassers will be subjected to embarrassment and humiliation on the stand while intimate details of their personal lives are revealed.<sup>11</sup> In fact, the Federal Rules of Evidence were not amended to afford victims of sexual harassment additional protection until about eight years after the *Meritor* decision.<sup>12</sup> The 1994 Amendments to Federal Rule of Evidence 412 (Rule 412)—more commonly known as the “rape shield law”<sup>13</sup>—revised the Rule to limit admissibility of evidence in both criminal and civil cases.<sup>14</sup> However, prior to the 1994 Amendments, Rule 412 prohibited only the admissibility of evidence of an alleged victim’s prior sexual encounters or sexual reputation in criminal cases.<sup>15</sup> The 1994 Amendments expanded the scope of the Rule’s protection to cover plaintiffs in civil cases involving alleged sexual misconduct.<sup>16</sup> The Advisory Committee’s Note following the 1994 Amendments states that one of the Rule’s major goals is to “encourage[]

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<sup>11</sup> Moreover, another reason women may be dissuaded from reporting their harassers is that society often makes light of issues surrounding sexual harassment. Because sexual harassment is a somewhat uncomfortable topic to discuss, numerous television shows and newspaper articles simply poke-fun at the issue. For example, in a 2005 episode of *Saturday Night Live*, a skit entitled “Sexual Harassment and You” joked about sexual harassment lawsuits. *Saturday Night Live: Sexual Harassment and You* (NBC television broadcast Apr. 16, 2005). The video begins with the narrator explaining, “Back in the old days, a workplace was a man’s domain. Today, life is not as simple. Businesses are filled with working women. . . . As a man, you want to have sex with all of them.” *Id.* The instructional video asserts that the key to winning a sexual harassment lawsuit is to be good looking. *Id.*

<sup>12</sup> See FED. R. EVID. 412 advisory committee’s note (“Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct.”).

<sup>13</sup> See, e.g., STEVE GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK 2007–2008 STUDENT EDITION, 117 (Thomas/West 2007) (1995) [hereinafter GOODE & WELLBORN, COURTROOM EVIDENCE]; DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 384 (forthcoming) [hereinafter MERRITT & SIMMONS, LEARNING EVIDENCE].

<sup>14</sup> Pub. L. 103-322, Title IV, § 40141(b), 108 Stat. 1919 (1994) (“[E]vidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.” (emphasis added)).

<sup>15</sup> See Pub. L. 95-540, § 2(a), 92 Stat. 2046 (1978); Pub. L. 100-690, § 7046(a), 102 Stat. 4400 (1988).

<sup>16</sup> FED. R. EVID. 412 (“The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . [e]vidence offered to prove that any alleged victim engaged in other sexual behavior. . . . [e]vidence offered to prove any alleged victim’s sexual predisposition.”).

victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders” by affording these victims more protection.<sup>17</sup> This protection aims “to safeguard . . . alleged victim[s] against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”<sup>18</sup>

Despite these goals, both the *Meritor* Court and the drafters of Rule 412 realized that while zealous protection of sexual harassment victims was necessary, it was also crucial that they balance this interest with a defendant’s interest in presenting defensive evidence.<sup>19</sup> As a result, the *Meritor* Court adopted the “unwelcomeness” standard, explaining that the appropriate inquiry in a sexual harassment case was whether or not an alleged victim indicated that sexual advances were unwelcome through his or her conduct.<sup>20</sup> The drafters of Rule 412 adopted the Supreme Court’s reasoning. While Rule 412 places a general ban on evidence regarding an alleged victim’s past sexual behavior or predisposition in both civil and criminal trials involving sexual misconduct, if the probative value of a piece of evidence in a civil trial substantially outweighs its prejudicial effect, it is admissible.<sup>21</sup> Moreover, many lawyers successfully defend against sexual harassment suits by using this exception to introduce evidence of an alleged victim’s past sexual predisposition or behavior, arguing that the alleged misconduct was indeed welcomed.<sup>22</sup>

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<sup>17</sup> FED. R. EVID. 412 advisory committee’s note.

<sup>18</sup> *Id.*; see *Smith v. Café Asia*, 246 F.R.D. 19, 21 (D.D.C. 2007) (commenting that “one of the purposes of [Rule 412] was to reduce the inhibition women felt about pressing complaints concerning sex harassment because of the shame and embarrassment of opening the door to an inquiry into the victim’s sexual history”); *Sanchez v. Zabihi*, 166 F.R.D. 500, 501 (D.N.M. 1996) (“[Rule 412] was promulgated to shield victims of rape and sexual harassment from potential embarrassment and to safeguard them against stereotypical thinking.”).

<sup>19</sup> *Meritor*, 477 U.S. at 68 (“The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”) (internal citations omitted); FED. R. EVID. 412 advisory committee’s note.

<sup>20</sup> *Meritor*, 477 U.S. at 68.

<sup>21</sup> FED. R. EVID. 412(b)(2) (“In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”).

<sup>22</sup> See Kevin C. Klein, Note, *Evidentiary Hurdles in Defending Sexual Harassment Suits: Amended Rule 412 and Rule 415 of the Federal Rules of Evidence*, 9 CORNELL J.L. & PUB. POL’Y 715, 721 (2000) [hereinafter Klein, *Evidentiary Hurdles*] (quoting JANA HOWARD CAREY, DEFENDING SEXUAL HARASSMENT CLAIMS, IN AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 1998, at 50 (PLI Litig & Admin. Practice Course, Handbook Series No. H0-0017 (1998)) (explaining that since the welcomeness

The goal of this Note is to analyze the case law after the 1994 Amendments, compare it to the case law prior to the Amendments, and determine whether or not the amended Rule 412 has successfully struck the intended balance between admissibility and exclusion.

This Note analyzes the Rule 412 civil exception and the impact that the 1994 Amendments have had on the federal courts, and on both plaintiffs and defendants in sexual harassment litigation. By focusing on the language of the Rule, the policies behind the Rule, and the policies driving the Federal Rules of Evidence collectively, this Note attempts to discuss and critique the “unwelcomeness” standard and the Rule 412(b)(2) balancing test from an evidentiary perspective, rather than a feminist legal theory, employment law, or constitutional law perspective.<sup>23</sup> Part II provides necessary background information. First, Part II discusses the shift in societal attitudes about sexual misconduct victims, the need for a rape shield law, and the original rape shield law enacted in 1978. Then, Part II discusses the Supreme Court’s landmark sexual harassment cases—*Meritor* and *Harris v. Forklift Systems, Inc.*

Part III critically analyzes the language of Rule 412, discussing how the Rule interacts and overlaps with the other Federal Rules of Evidence, and examines the language in subsection (b)(2), the civil exception. Part IV surveys the post-1994 Amendments case law, exploring case law where courts have excluded evidence of an alleged victim’s past sexual behavior and predisposition, and case law where such evidence has been admitted. Part V discusses whether or not the Rule 412(b)(2) balancing test works and helps to achieve the more specific objectives of the rape shield law and the broader policies and goals of the Federal Rules of Evidence. Finally, Part V suggests some general guidelines for courts to follow that would create a more methodical and consistent approach to applying the Rule 412(b)(2) balancing test.

## II. FIRST THING’S FIRST: THE HISTORY OF SEXUAL HARASSMENT LAW

The law of rape has substantially influenced the law of sexual

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standard was established in *Meritor*, a plaintiff’s invitation to the alleged harassment has “become a focal point of the defense” and many attorneys have successfully defended against these suits by arguing that the alleged harassment was welcomed by the plaintiff).

<sup>23</sup> Of course, these areas of law all overlap at times, and as a result, they will be briefly discussed throughout different areas of this Note. Feminist legal theory, employment law, and constitutional law are simply not the focal point of this Note. One reason this Note focuses on the law of evidence is because most of the research and writing that has examined and critiqued the rape shield law has done so from feminist legal theory or employment law perspectives.

harassment.<sup>24</sup> Until 1994, when the rape shield law was amended to include the civil exception, Rule 412 limited the admissibility of evidence only in criminal cases.<sup>25</sup> Consequently, this Part first explores how criminal defense attorneys in the late 1800s and early 1900s used evidence of a rape victim's past sexual behavior or predisposition to attack her credibility. After the Federal Rules of Evidence were promulgated, but prior to the rape shield law, defense attorneys still attempted, usually successfully, to persuade a judge to admit prejudicial evidence against sexual harassment victims through Federal Rule of Evidence 404 (Rule 404).<sup>26</sup> Thus, this Part also provides an explanation of Rule 404. However, as the feminist movement gained some traction, and the legal community became increasingly concerned with the treatment of rape victims, there was a general "push" for more stringent protection of sexual misconduct victims.<sup>27</sup> Therefore, this Part concludes with a discussion about how the Supreme Court, the federal courts, and Congress responded to this "push."

*A. Before the Rape Shield Law, Before a Legal Claim for Sexual Harassment, and Even Before the Term "Sexual Harassment"*

During the late Nineteenth Century and first half of the Twentieth Century, most courts held that evidence of a rape victim's past sexual behavior or predisposition was admissible for a purpose similar to the one articulated in *Anderson v. State*:<sup>28</sup>

This evidence has been introduced only for the purpose of affecting her credibility as a witness, and as a circumstance affecting the probability of the act of intercourse being voluntary or against her will,—upon the theory that a person of bad moral character is less likely to speak the truth as a witness than one of good moral character, and that a woman who is chaste and virtuous will be less likely to consent to an act of illicit carnal intercourse than one who is unchaste.<sup>29</sup>

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<sup>24</sup> Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991) (arguing that the same doctrines governing rape prosecutions are "familiar tools in sexual harassment cases" and "have been borrowed almost wholesale from traditional rape law").

<sup>25</sup> Compare Pub. L. 103-322, Title IV, § 40141(b), 108 Stat. 1919 (1994), with Pub. L. 95-540, §2(a), 92 Stat. 2046 (1978), and Pub. L. 100-690, § 7046(a), 102 Stat. 4400 (1988).

<sup>26</sup> See *infra* notes 31–33 and accompanying text.

<sup>27</sup> See *infra* note 46 and accompanying text.

<sup>28</sup> 4 N.E. 63 (Ind. 1885).

<sup>29</sup> *Id.* at 65 (ultimately denying the accused's motion to quash the indictment and affirming finding of guilt below).



Until the rape shield law was adopted, many courts used similar reasoning to admit evidence of a victim's past sexual behavior or predisposition.<sup>30</sup>

Prior to the adoption of Rule 412, the Federal Rules of Evidence did not bar evidence of a victim's sexual predisposition. Federal Rule of Evidence 404 (Rule 404) places a general ban on propensity evidence (also referred to as character evidence).<sup>31</sup> Despite Rule 404's general ban on propensity evidence prior to Rule 412, a defense attorney could admit evidence of a rape victim's sexual predisposition under Rule 404(a)(2), which allows evidence of a pertinent character trait of the victim to be admitted.<sup>32</sup> The defense

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<sup>30</sup> See *Gish v. Wisner*, 288 F. 562, 562 (5th Cir. 1923) ("[I]n a prosecution or suit for an assault with intent to commit rape, the rule is established by the great weight of authority that the general reputation for chastity of the complaining witness, who claims to be the victim, is material as bearing upon the vital question of her consent or nonconsent."); *People v. Bell*, 274 P. 393, 395 (Cal. Ct. App. 1929) (conceding that a defendant who has been charged with rape should be "allowed the widest latitude compatible with the technical rules of evidence" to test the credibility and chastity of the prosecuting witness); *People v. Smallwood*, 10 N.W.2d 303, 305 (Mich. 1943) ("In charges of rape, incest, etc., where the complainant is a young girl, her credibility may be affected by her unchaste tendencies.") (internal citation omitted); *Packineau v. United States*, 202 F.2d 681, 685 (8th Cir. 1953) (excluding evidence that the alleged victim had a relationship with a male who was not a party to the lawsuit, that she did not report the alleged offense until after two days had elapsed, and that she went with the defendant on the night of the alleged misconduct on her "own volition," was a reversible error).

<sup>31</sup> See FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."). A propensity argument would go as follows: because a person has a certain tendency, he or she acted consistently with that tendency. MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 318. For example, Person A broke into a convenience store on May 1st. Because Person A behaved this way on a particular occasion, May 1st, he or she has a dishonest character and tendency to break and enter. Furthermore, because Person A has a tendency to break and enter, he or she must have also broken into Person B's home on July 1st. This example is a variation of an example in MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 318. Therefore, in an attempt to discourage this form of reasoning, Rule 404 bars propensity evidence. MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 320.

<sup>32</sup> Subsection (a)(2) provides in pertinent part that the following evidence is admissible: "In a criminal case . . . evidence of a pertinent trait of character of the alleged victim of the crime . . ." FED. R. EVID. 404(a)(2). Today, this subsection states that it is "subject to the limitations imposed by Rule 412." *Id.* Notably, character evidence that is admissible under Rule 404(a)(2) may only be proved through opinion or reputation evidence. FED. R. EVID. 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion."). So, regardless of Rule 412, specific instances of sexual behavior may not be used to prove a witness's untruthful behavior. FED. R. EVID. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking

attorney could also attempt to get prejudicial evidence admitted under Rule 404(b), which allows evidence to prove another relevant purpose (other than propensity).<sup>33</sup> For example, prior to Rule 412, criminal defense attorneys claimed to be introducing evidence of a rape victim's past sexual behavior to attack the victim's character and impeach her credibility.<sup>34</sup> However, defense attorneys usually hoped that the introduction of such evidence would allow the jury to make a propensity inference.<sup>35</sup> For example, the jury may infer that because the victim was sexually promiscuous, she was more likely to consent to the particular sexual act at issue.<sup>36</sup>

*Pachineau v. United States* provides an example of a court that admitted evidence of a victim's past sexual behavior and predisposition in a sexual misconduct case.<sup>37</sup> This case is representative of how courts during the 1950s or 60s would have dealt with a similar issue. The case involved an alleged rape on an Indian reservation.<sup>38</sup> The lower court had convicted the defendants of rape, but the Eighth Circuit reversed—dismissing one defendant and granting the other a new trial—on the grounds that the lower court's exclusion of testimony regarding the plaintiff's prior sexual behavior was a reversible error.<sup>39</sup> The court reasoned that if “an ordinary person [was] called on to make an appraisal” of the plaintiff's accusation against the defendants, his or her “reaction would certainly be very different” if he or she had known

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or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence.”); see GOODE & WELLBORN, COURTROOM EVIDENCE, *supra* note 13, at 118.

<sup>33</sup> Subsection (b) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .” See also MERRITT & SIMMONS, LEARNING EVIDENCE, *supra* note 13, at 384–87 (explaining how Rule 412 was necessary in light of Rule 404).

<sup>34</sup> See MERRITT & SIMMONS, LEARNING EVIDENCE, *supra* note 13, at 385; Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1169–70 (1995) [hereinafter Monnin, *Proving Welcomeness*] (explaining evidence of “a rape victim's past sexual behavior was introduced to impeach her credibility as well as to demonstrate her desire for sexual relations on the occasion charged”) (internal citation omitted).

<sup>35</sup> MERRITT & SIMMONS, LEARNING EVIDENCE, *supra* note 13, at 385 (clarifying that “defense attorneys ostensibly offered the evidence for purposes other than proving propensity, but they usually hoped that the jury would conclude the victim was sexually promiscuous and therefore that she probably consented to a sexual act with the defendant”) (internal citation omitted).

<sup>36</sup> *Id.*

<sup>37</sup> 202 F.2d 681, 688 (8th Cir. 1953).

<sup>38</sup> *Id.* at 682.

<sup>39</sup> *Id.* at 682, 688.

that the plaintiff had been co-habiting with a man a few months prior "than it would be if she were the unsophisticated young lady she appeared to be."<sup>40</sup> The Court also emphasized that "her night's adventures . . . were admittedly of her own volition" and that she did not report the misconduct to the Indian Agency until two days after the alleged rape had occurred.<sup>41</sup>

There were, however, a handful of courts prior to Rule 412's adoption that excluded evidence of plaintiffs' past sexual behavior.<sup>42</sup> However, in most of these cases, there was unusually strong evidence against the defendant from the start. For example, in one case an alleged rapist used a hunting knife while threatening the victim.<sup>43</sup> In another example, there was evidence that a defendant took retaliatory action in a quid pro quo sexual harassment case.<sup>44</sup> Furthermore, most of the cases that excluded evidence of plaintiffs' past sexual behaviors were drafted during the beginning of the feminist movement.<sup>45</sup>

As the feminist movement grew stronger, the legal community became increasingly concerned with treatment of rape victims in courts and began to realize that evidence of past sexual behavior had little or no relevance when attempting to make a determination as to whether a woman had consented to sex on a given occasion.<sup>46</sup> While the danger of unfair prejudice to a plaintiff

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<sup>40</sup> *Id.* at 685–86.

<sup>41</sup> *Id.* at 685.

<sup>42</sup> *See, e.g.,* *William v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (finding retaliatory actions of a male supervisor taken because female employee had declined his sexual advances constituted Title VII discrimination); *State v. Geer*, 533 P.2d 389, 391–92 (Wash. Ct. App. 1975) (finding evidence relating to victim's past conduct with other men was properly excluded by the lower court where the defendant broke into the home late at night, intimidated the victim with a hunting knife, and victim's ultimate submission at point of hunting knife was not consensual).

<sup>43</sup> *Geer*, 533 P.2d at 391–92.

<sup>44</sup> *William*, 413 F. Supp. at 657. Quid pro quo sexual harassment is when a superior threatens a certain consequence, such as a promotion or demotion, in exchange for sex. The differences between quid pro quo sexual harassment and hostile work environment harassment will be discussed at greater length below. *See infra* notes 68–73 and accompanying text.

<sup>45</sup> *See id.* Both cases occurred just a few years prior to Rule 412.

<sup>46</sup> *See* 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Holtzman) (explaining that because "rape trials become inquisitions into the victim's morality" rather than trials about a defendant's guilt, "it is not surprising that it is the least reported crime. . . as few as one in ten rapes is ever reported"); MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 386 (noting that rape victims had become reluctant to come forward); Earl Babbie, *Chapter 13: Evaluation Research*, in *THE BASICS OF SOCIAL RESEARCH*, 311, 327 (2d ed., Wadsworth Publishing 2001) (explaining that social scientists had, for many years prior to rape reform legislation, noticed problems in the prosecutions of rape cases—specifically, that victims were

was usually quite high, the corresponding probative value of evidence of past sexual behavior was often very low.<sup>47</sup> In 1974, Michigan adopted the first rape shield law, and soon after, Congress followed suit.<sup>48</sup> In 1978, Rule 412 took effect.<sup>49</sup>

When Rule 412 became a law in 1978, its only function was to restrict evidence relating to a victim's past sexual behavior in rape, or assault with intent to rape, prosecutions.<sup>50</sup> When drafting Rule 412, Congress attempted to balance a number of competing concerns. First, it was important to assure that a defendant in a rape or sexual assault case would have adequate opportunity to present a defense.<sup>51</sup> Second, Congress was concerned with protecting sexual harassment victims and ensuring that their private lives would not be subject to intensive public scrutiny.<sup>52</sup> Finally, Congress considered society's interest in encouraging victims to come forward and testify.<sup>53</sup>

Despite Congress's concerns, Rule 412, as originally enacted, restricted only evidence of the victim's past sexual behavior in certain prosecutions—rape or assault with intent to rape—while the same type of evidence *was being admitted* in proceedings for other sex crimes that were being tried in federal court.<sup>54</sup> Congress amended Rule 412 in 1988 because of this disparate

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portrayed as being immoral and as having instigated the sex act); Monnin, *Proving Welcomeness*, *supra* note 34, at 1170 (explaining that Congress recognized “the logical inconsistencies inherent in the use of such evidence and the damage to the victim involved in its admission”) (internal citations omitted).

<sup>47</sup> GOODE & WELLBORN, COURTROOM EVIDENCE, *supra* note 13, at 118.

<sup>48</sup> See MERRITT & SIMMONS, LEARNING EVIDENCE, *supra* note 13.

<sup>49</sup> Pub. L. 95-540, § 2 (a), 92 Stat. 2046 (1978).

<sup>50</sup> See Pub. L. 95-540, § 2 (a), 92 Stat. 2046 (1978) (“[I]n a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.”).

<sup>51</sup> See 124 CONG. REC. H1195 (daily ed. Oct. 10, 1978); 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann) (clarifying that while the rape shield law is meant to protect rape victims from embarrassment, “it does not do so, however, by sacrificing any constitutional right possessed by the defendant”).

<sup>52</sup> See 124 CONG. REC. H1195 (daily ed. Oct. 10, 1978); 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann) (“[T]he principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives. It does so by narrowly circumscribing when such evidence may be admitted.”).

<sup>53</sup> See 124 CONG. REC. H1195 (daily ed. Oct. 10, 1978); see also MERRITT & SIMMONS, LEARNING EVIDENCE, *supra* note 13, at 387 (pointing out that the federal and state rape shield laws reflect a consensus that “robust protection of sexual assault victims is necessary to encourage them to come forward and testify”).

<sup>54</sup> See Pub. L. 95-540, § 2 (a), 92 Stat. 2046 (1978).

evidentiary treatment.<sup>55</sup> The amendments applied Rule 412 to all sex offenses designated in Title 18, Chapter 109A of the United States Code.<sup>56</sup> It was not until 1994 that Rule 412 was amended and applied in both criminal *and* civil cases.<sup>57</sup>

Next, the legal community had to determine exactly which types of misconduct constituted actionable sexual harassment.

### *B. Establishing a Legal Claim for Sexual Harassment*

Title VII of the Civil Rights Act of 1964 (Title VII) states that it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .”<sup>58</sup> Despite Title VII’s explicit reference to sex discrimination, the term “sexual harassment” and the corresponding legal claim did not emerge until the mid-1970s.<sup>59</sup> Although Rule 412 originally became a law in 1978, it restricted evidence relating to a victim’s extraneous, past sexual behavior in prosecutions for two specific crimes only: rape or assault with intent to rape.<sup>60</sup> Accordingly, during the mid-1970s and 80s the United States Supreme Court struggled to determine precisely how much protection the law should afford alleged victims in civil sexual harassment

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<sup>55</sup> See Pub. L. 100-690, § 7046 (a), 102 Stat. 4400 (1988).

<sup>56</sup> *Id.* (“striking ‘rape or of assault with intent to commit rape’ each place it appears and inserting ‘an offense under chapter 109A of title 18, United States Code’”).

<sup>57</sup> Pub. L. 103-322, Title IV, § 40141(b), 108 Stat. 1919 (1994).

<sup>58</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>59</sup> ATWELL, EQUAL PROTECTION, *supra* note 3, at 84 (“sexual harassment is an old issue, but one that only gained a name and legal history during the last quarter of the twentieth century”); BAER, WOMEN IN AMERICAN LAW, *supra* note 5, at 85 (noting that “[t]he term *sexual harassment* did not exist in 1964, when Title VII was passed”); Martha E. Chamallas, *Highlights of the Scholarship on Sexual Harassment*, in FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY 325, 325 (Betty Taylor, Sharon Rush & Robert J. Munro eds., 1999) [hereinafter CHAMALLAS, *Highlights*] (noting that the term “sexual harassment” was “[b]orn in the mid-1970s” and was “invented by feminist activists, first given legal content by feminist litigators and scholars, and sustained by a wide-ranging body of scholarship generated largely by feminist academics”); Monnin, *Proving Welcomeness*, *supra* note 34, at 1161–62 (noting that given the minimal legislative history “to guide interpretation of Title VII’s prohibition against discrimination based on sex,” courts struggled when applying Title VII to sexual harassment claims and did not really recognize sexual harassment claims under Title VII until the last half of 1970).

<sup>60</sup> Pub. L. 95-540, § 2(a), 92 Stat. 2046 (1978).

cases.<sup>61</sup>

### 1. *The Meritor Decision*

*Meritor* was the United States Supreme Court's first sexual harassment case.<sup>62</sup> On one hand, *Meritor* is considered "a remarkable victory for feminist legal activists."<sup>63</sup> On the other, the Court was nevertheless minimally protective of sexual harassment victims with regard to the admission of prejudicial evidence against them in sexual harassment lawsuits.<sup>64</sup>

The first issue the *Meritor* Court discussed was whether, in order to have a valid claim for sexual harassment, there must be some form of economic or tangible discrimination present.<sup>65</sup> The Court stated that no such finding was necessary, reasoning that the language in Title VII "evinces a congressional intent to strike the entire spectrum of disparate treatment of men and women in employment."<sup>66</sup>

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<sup>61</sup> See *Meritor*, 477 U.S. at 66–69; *Harris*, 510 U.S. at 17, 21–23 (finding that to have an actionable "hostile environment" sexual harassment claim, the *Meritor* standard requires evidence of an objectively hostile or abusive environment as well as a victim's subjective perception that the environment is hostile or abusive, and whether or not such an environment is sufficiently hostile and abusive depends on the totality of the circumstances); *Oncale*, 523 U.S. at 82 (holding that same-sex sexual harassment is actionable under Title VII).

<sup>62</sup> See, e.g., ATWELL, EQUAL PROTECTION, *supra* note 3, at 85.

<sup>63</sup> CHAMALLAS, *Highlights*, *supra* note 59, at 329 (noting that the Court at that time was extremely conservative, but nevertheless, recognized a claim for sexual harassment even where the harassment produced no direct economic injury); Wood, *Inviting Sexual Harassment*, *supra* note 5, at 425 (quoting *Delaria v. American Gen. Fin., Inc.*, 998 F. Supp. 1050, 1058 (S.D. Iowa 1998)) (referring to *Meritor* as a "landmark decision" that "made it illegal and a violation of Title VII for 'employers . . . [to] requir[e] their female employees to run a gauntlet of hostility and abuse for the privilege of being allowed to work and make a living'").

<sup>64</sup> See *Meritor*, 477 U.S. at 69 ("While 'voluntariness' in the sense of consent is not a defense . . . it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."); CHAMALLAS, *Highlights*, *supra* note 59, at 329 (noting the *Meritor* court stated that "a plaintiff's provocative dress or public expression of sexual fantasies could be admitted into evidence to discredit her allegations and defeat her claim"); Wood, *Inviting Sexual Harassment*, *supra* note 5, at 426; Monnin, *Proving Welcomeness*, *supra* note 34, at 1169 (reasoning that, given a plaintiff's speech and dress were relevant to determine welcomeness under *Meritor*, "certainly other sexually-oriented conduct in the workplace or in other contexts becomes material").

<sup>65</sup> *Meritor*, 477 U.S. at 64.

<sup>66</sup> *Id.* at 64, 67–68 ("The Court of Appeals recognized, we think correctly, that [the District Court's ultimate finding] was likely based on one or both of two erroneous view

Secondly, the Court addressed the distinction between quid pro quo and hostile environment discrimination.<sup>67</sup> At the time *Meritor* was decided, the Equal Employment Opportunity Commission's (EEOC's) Guidelines acknowledged both quid pro quo and hostile environment forms of sexual harassment (and the Guidelines still acknowledge both forms today).<sup>68</sup> The Guidelines explain that sexual harassment consists of "[u]nwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature" when "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," or "(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."<sup>69</sup> Stated simply, quid pro quo harassment occurs when a supervisor, employer, co-worker, or other individual threatens a certain consequence unless sex is performed.<sup>70</sup> Examples of threatened consequences include a raise, promotion, demotion, or termination.<sup>71</sup>

In contrast to quid pro quo sexual harassment, hostile environment harassment does not involve any threatened consequence in exchange for sex. Rather, such sexual discrimination involves unwelcome sexual advances that create a "hostile" working environment.<sup>72</sup> The EEOC Guidelines

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of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment."); see CHAMALLAS, *Highlights*, *supra* note 59, at 329 (noting that "[a] very conservative Court allowed a claim even in those instances in which the harassment produced no direct economic injury").

<sup>67</sup> *Meritor*, 477 U.S. at 65–67.

<sup>68</sup> 29 C.F.R. § 1604.11(a).

<sup>69</sup> *Id.*

<sup>70</sup> ATWELL, EQUAL PROTECTION, *supra* note 3, at 85; see Monnin, *Proving Welcomeness*, *supra* note 34, at 1163 ("Quid pro quo' harassment occurs when the extension or denial of job benefits flows from the employee's submission to or rejection of her supervisor's advances."); Wood, *Inviting Sexual Harassment*, *supra* note 5, at 424 (explaining that quid pro quo sexual harassment usually involves a threat to one's job security if the sexual advances are refused); see also Estrich, *supra* note 24, at 834 ("The plaintiff in a quid pro quo case is not required, as a hostile environment claimant is, to prove that harassment is pervasive and objectively intolerable.").

<sup>71</sup> See ATWELL, EQUAL PROTECTION, *supra* note 3, at 85; Monnin, *Proving Welcomeness*, *supra* note 34, at 1163 (noting the "paradigm factual situation is 'sleep with me or I'll fire you'").

<sup>72</sup> See, e.g., *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365 (10th Cir. 1997) (explaining that a plaintiff alleging hostile work environment harassment needs to show that the "unwelcome, sexually-oriented conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive environment"); *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991) (explaining that a hostile environment exists when an employee can show the following: (1) he or she was subject to verbal or physical

articulate hostile environment sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature constitutes sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>73</sup>

The *Meritor* Court held that both quid pro quo and hostile environment harassment could be grounds for a legal claim of sexual harassment,<sup>74</sup> but clarified that, “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’”<sup>75</sup> While the

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conduct of a sexual nature, such as requests for sex or sexual advances; (2) such conduct was unwelcome; and (3) such conduct altered the employee’s working environment and created an abusive environment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988) (clarifying that to prevail on a hostile environment sexual harassment claim a plaintiff must show that (1) she was part of a protected group; (2) she was subjected to unwelcome sexual harassment; (3) such harassment was based on sex; (4) the harassment affected a term or condition of employment; and (5) her employer knew or should have known of the harassment, but failed to take any action); *In re Discipline of Peters*, 428 N.W.2d 375, 378 (Minn. 1988) (explaining hostile environment sexual harassment as existing when “employment is conditioned, either explicitly or implicitly, on adapting to a workplace in which the employee is the target of repeated, unwelcome, sexually derogatory remarks or physical contact of sexual nature”); *Monnin, Proving Welcomeness*, *supra* note 34, at 1164 (explaining that this type of harassment occurs when an “employee is subject to conduct that is demeaning or degrading because of her gender, regardless of whether demands for sexual consideration are involved”).

<sup>73</sup> 29 C.F.R. § 1604.11(a).

<sup>74</sup> 477 U.S. at 66–67.

<sup>75</sup> *Id.* at 67 (internal citation omitted); see *Harsco Corp.*, 475 F.3d at 1187 (noting that the Supreme Court in *Meritor* made it clear that juries should not find a hostile working environment “merely based on ordinary socializing, such as intersexual flirtation”); Wood, *Inviting Sexual Harassment*, *supra* note 5, at 425 (characterizing a workplace that is actionable as “hellish” and explaining that isolated incidents alone would not constitute a sufficiently hostile environment). As a result of this language in the *Meritor* opinion, courts have struggled to determine how many incidents of misconduct are sufficient to create a hostile work environment based upon pervasiveness. See *Griffin v. Pinkerton’s, Inc.*, 173 F.3d 661, 665 (8th Cir. 1999) (holding that five incidents of misconduct over approximately one year were not sufficiently pervasive enough to create a hostile working environment); *Sprague*, 129 F.3d at 1366 (finding that five separate incidents occurring over approximately sixteen months did not constitute a hostile work environment based upon pervasiveness when one such incident was a request by a supervisor for the plaintiff to undo the top button of her blouse); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 334–35 (7th Cir. 1993) (holding that plaintiff did not show the environment was sufficiently pervasive to constitute a hostile working environment where her alleged harasser repeatedly called her a “dumb blond,” asked her about her personal life, told her how beautiful she was, and placed “I love you” signs around her work area); *Dunegan v. City of Council Grove*, 77 F. Supp. 2d 1192,



majority opinion seems to have fully embraced the EEOC's Guidelines, the Guidelines were not adopted in their entirety—employers under *Meritor* were not to be automatically held liable for the harassing actions of their employees, and instead, agency principles were to be applied (contrary to the EEOC Guidelines at that time).<sup>76</sup>

The most important and controversial portion of the *Meritor* opinion was that which articulated the “unwelcomeness” requirement. After *Meritor*, the appropriate question in a sexual harassment case is not whether the alleged sex-related conduct was voluntary.<sup>77</sup> Instead, “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”<sup>78</sup> In other words, the question is whether or not the plaintiff's conduct indicated that the sexual conduct or advances were unwelcome.<sup>79</sup> By declaring this the appropriate inquiry, the Court shifted focus onto the woman and found that evidence of a woman's dress, personal fantasies, or sexually provocative speech was relevant.<sup>80</sup>

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1197 (D. Kan. 1999) (concluding that incidents were not frequent and pervasive enough to constitute a hostile work environment where on one occasion, the plaintiff's supervisor put his arms around her from behind, “squeezed her, grabbed her right breast, and kissed her on both sides of the neck,” and on the other, the plaintiff's coworker “put his hands and arms on plaintiff [sic] and made efforts to kiss her”); *Stoeckel*, 882 F. Supp. at 1109–10 (determining that a hostile work environment based upon pervasiveness did not exist where an alleged harasser told the plaintiff that she looked “very good in high heels,” touched her blouse to straighten her collar, led her around the office by hand, and made an improper advance at her on an elevator); *Ballou v. Univ. of Kan. Med. Ctr.*, 871 F. Supp. 1384, 1386 (D. Kan. 1994) (holding that plaintiff did not show environment was sufficiently pervasive where the alleged harasser told her “I know you feel the same way about me as I feel about you,” and she responded that she was not interested, but he nevertheless persisted in staring at the plaintiff, asking her to kiss him on her birthday, and listening in on her phone calls to her boyfriend); *but cf.* Fitzgerald, Schneider, & Swan, *Job-Related*, *supra* note 3, at 413 (revealing in their research that even relatively infrequent levels of harassment may have negative effects on the victims and noting that employees making complaints regarding sexual harassment are not necessarily being oversensitive or benign).

<sup>76</sup> Compare *Meritor*, 477 U.S. at 72 (“[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors.”) with *id.* at 71 (citing 29 C.F.R. § 1604.11(c)) (noting that the EEOC would hold an employer liable for the acts of its agents without regard to notice), and CHAMALLAS, *Highlights*, *supra* note 59, at 329 (“Departing from the EEOC Guidelines, the Court ruled that employers were not automatically liable for the harassing acts of supervisory employees in offensive work environment cases.”).

<sup>77</sup> *Meritor*, 477 U.S. at 68.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 68–69; see *supra* note 16; MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 283 (2d ed. 2003) [hereinafter CHAMALLAS, INTRODUCTION]

## 2. *Post-Meritor Confusion*

After *Meritor*, lower courts struggled to determine the plaintiff's burden of proof in a Title VII sexual harassment suit for hostile environment.<sup>81</sup> *Rabidue v. Osceola Refining Co.* was decided shortly after the Supreme Court decision, and demonstrates lower court, post-*Meritor* confusion.<sup>82</sup>

In *Rabidue*, a female plaintiff brought suit alleging sexual discrimination and sexual harassment in violation of Title VII.<sup>83</sup> The plaintiff's sexual harassment claim arose primarily as a result of a supervisor at her company, who was described by the Court as "an extremely vulgar and crude individual who customarily made obscene comments about women."<sup>84</sup> Additionally, the plaintiff demonstrated that the supervisor, as well as other male employees, routinely displayed nude pictures of women in their offices.<sup>85</sup>

Notwithstanding these allegations, the Sixth Circuit ultimately held that the plaintiff had failed to sustain her burden of proof.<sup>86</sup> According to the Court, to have an actionable hostile environment claim, a plaintiff must show that the offensive conduct would have interfered with a hypothetical reasonable person's work performance and seriously affected that person's psychological well-being.<sup>87</sup> Furthermore, if the plaintiff met that burden, she

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(equating sexual harassment trials to rape prosecutions because trials can often produce a "second injury," which sexual harassment victims experience when they bring their claims to court"); CHAMALLAS, *Highlights*, *supra* note 59, at 329 (citing Estrich, *supra* note 24, at 813) (noting that as a result of *Meritor*, "often the conduct of the sexual harassment victim, rather than the conduct of the harasser, is scrutinized during the course of litigation"); Monnin, *Proving Welcomeness*, *supra* note 34, at 1166-67 (explaining that *Meritor* established that a "plaintiff's invitation to or provocation of alleged harassment is of central, if not determinative, importance to the disposition of her claim").

<sup>81</sup> Compare *Rabidue v. Osceola Refining Co.* 805 F.2d 611, 620 (6th Cir. 1986) (requiring a finding that sexual harassment would interfere with a reasonable person's work performance and seriously affect that person's psychological well-being) and *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1985) ("[A]n actionable harassment claim must establish by the totality of the circumstances, the existence of a hostile or abusive working environment which is severe enough to affect the psychological stability of a minority employee.") with *Ellison*, 924 F.2d at 877-78 (finding no such requirement necessary).

<sup>82</sup> 805 F.2d 611 (6th Cir. 1986).

<sup>83</sup> *Id.* at 614.

<sup>84</sup> *Id.* at 615.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 622.

<sup>87</sup> *Id.* at 620. For one opinion in agreement with *Rabidue* and one opinion in disagreement, see *supra* note 81.

also had to demonstrate that she herself had been offended by the defendant's conduct and had suffered some injury resulting from the harassment.<sup>88</sup> The *Rabidue* Court quoted the district court judge with whom they agreed:

Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. . . . Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.<sup>89</sup>

*Reed v. Shepard* also demonstrates the courts' befuddlement post-*Meritor*, not only regarding a plaintiff's burden of proof, but also the scope and application of the unwelcomeness requirement.<sup>90</sup> The plaintiff in *Reed*, a former employee at the county sheriff's department, brought charges of sexual discrimination, harassment, and retaliation under Title VII after being terminated.<sup>91</sup> The plaintiff alleged that she had been: handcuffed to objects in the office, including a toilet, and had her face pushed in the toilet water; subjected to sexually suggestive remarks and lewd jokes; physically hit and punched in the kidneys; frequently tickled; and, occasionally, had her head forcefully placed in her coworkers' laps.<sup>92</sup> Nevertheless, after reciting these allegations, the court stated that "[b]y any objective standard, the behavior of the male deputies and jailers toward [the plaintiff] revealed at trial was, to say the least, repulsive. But apparently not to [the plaintiff]."<sup>93</sup> Evidence against the plaintiff included that she had propensity to use foul language, told dirty jokes that often contained sexual innuendos, failed to wear a bra to work at times, and showed off an abdominal scar to male employees.<sup>94</sup>

The Court ultimately affirmed the lower court's finding that the defendant's conduct had been welcomed, reasoning that the plaintiff had been receptive to such conduct because of her sexually explicit jokes and

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<sup>88</sup> *Rabidue*, 805 F.2d at 620.

<sup>89</sup> *Id.* at 620–21 (quoting Judge Newblatt and citing the lower court opinion, *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (D.C. Mich. 1984)); see also *Ellison*, 924 F.2d at 877 (criticizing the Sixth Circuit's holding in *Rabidue*, and noting that the Court had "refused to find a hostile environment where the workplace contained posters of naked and partially dressed women, and where a male employee customarily called women 'whores,' 'pussy,' and 'tits,' [and] referred to plaintiff as 'fat ass'").

<sup>90</sup> 939 F.2d 484 (7th Cir. 1991).

<sup>91</sup> *Id.* at 485.

<sup>92</sup> *Id.* at 486. Notably, this list is not comprehensive.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 487.

suggestions.<sup>95</sup> The Court also emphasized that the plaintiff tolerated such conduct and failed to complain about it, despite the fact that she explained she had believed it was necessary to stay quiet to maintain her career.<sup>96</sup>

### 3. *The Harris Decision*

In 1993, the United States Supreme Court delivered its next major opinion in the area of sexual harassment law, *Harris v. Forklift Systems, Inc.*<sup>97</sup> Certiorari was granted to resolve an existing circuit split regarding whether, misconduct must seriously affect the plaintiff's mental well-being or lead her to suffer some form of injury to have an actionable hostile environment claim.<sup>98</sup> Justice O'Connor, writing for the Court, explained that a plaintiff need not demonstrate that she suffered a mental breakdown or was harmed psychologically to have a valid cause of action.<sup>99</sup> Evidence that the harassment detracted from her job performance, discouraged her from remaining on the job, or kept her from advancing forward in her career was sufficient.<sup>100</sup> While a plaintiff must have *subjectively* perceived the environment to be abusive, the conduct allegedly amounting to harassment must have also been severe and pervasive enough for a "reasonable person" to find the environment *objectively* hostile.<sup>101</sup>

Although the *Harris* decision clarified important issues in sexual harassment law, an inevitable question arose in the lower courts in the

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<sup>95</sup> *Id.* at 491–92.

<sup>96</sup> *Reed*, 939 F.2d at 492.

<sup>97</sup> 510 U.S. 17 (1993).

<sup>98</sup> *Id.* at 20. Compare *Downes v. FAA*, 775 F.2d 288, 292 (explaining that to establish a claim for hostile environment sexual harassment, "(1) the offensive conduct must be sufficiently pervasive so as to alter the conditions of employment, and (2) be sufficiently severe and persistent to affect seriously the psychological well-being of an employee"), *Rabidue*, 805 F.2d at 620 (explaining that plaintiff must show she suffered some degree of injury as a result of the harassment), and *Vance*, 863 F.2d at 1510 (requiring the existence of an environment severe enough to affect the psychological stability of an employee), with *Ellison*, 924 F.2d at 877–78 (rejecting *Rabidue*'s requirement that a plaintiff must be seriously affected psychologically and explaining that such a requirement does not follow directly from the language of *Meritor*).

<sup>99</sup> *Harris*, 510 U.S. at 22; see BAER, WOMEN IN AMERICAN LAW, *supra* note 5, at 91 (explaining that a unanimous Supreme Court ruled that a plaintiff need not prove psychological harm to have an actionable claim for hostile environment sexual harassment).

<sup>100</sup> *Harris*, 510 U.S. at 22.

<sup>101</sup> *Id.* at 21.

aftermath: who was this reasonable person? Was it a he or a she?<sup>102</sup> Men and women often have different ideas about what type of conduct constitutes sexual harassment.<sup>103</sup> Furthermore, one woman's idea about what constitutes sexually offensive conduct may be extremely different from another woman's idea of such conduct. Who is being reasonable? A number of scholars have argued that while some courts attempt to apply a reasonable women standard, many actually apply a reasonable male standard.<sup>104</sup> One suggestion has been to instead ask: would a reasonable person the same sex as the victim have been offended?<sup>105</sup> Others are against the reasonableness standard in its entirety and argue that such a legal construct "poses the risk of essentialism, *i.e.*, treating all women as if they possessed some natural trait that predetermines their response to sexual behavior."<sup>106</sup> Although further discussion of this issue is outside of the scope of this Note, the reasonable person standard articulated in *Harris* has undoubtedly sparked much debate among feminist scholars and poses problems for courts attempting to apply such a standard.

Once the Supreme Court established that both *quid pro quo* and hostile work environment harassment were actionable forms of sexual harassment, that a plaintiff need not demonstrate that she suffered a mental breakdown to have a valid cause of action, and that harassment must have been both subjectively and objectively perceived as hostile and abusive, most courts realized that victims of sexual harassment were to be afforded additional

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<sup>102</sup> ATWELL, EQUAL PROTECTION, *supra* note 3, at 86 ("But who is this reasonable person—a man or a woman?"); BAER, WOMEN IN AMERICAN LAW, *supra* note 5, at 92 ("Reasonably" to whom?).

<sup>103</sup> Compare ATWELL, EQUAL PROTECTION, *supra* note 3, at 86 (recognizing that what a "reasonable" man may find funny, a "reasonable" woman may find offensive), and CHAMALLAS, *Highlights*, *supra* note 59, at 333 (explaining that the "reasonable person standard makes it appear as if there can be only one 'objective' assessment of human behavior" and ignores the fact that men and women experience sexual conduct differently), with *Matter of Discipline of Peters*, 428 N.W.2d 375, 379 n.2 (Minn. 1988) (arguing that surveys indicate men and women agree about what type of conduct amounts to sexual harassment in the abstract; rather, the discrepancy is concerning the amount of such harassing conduct, and women believe that sexual harassment is much more persistent than men).

<sup>104</sup> See ATWELL, EQUAL PROTECTION, *supra* note 3, at 86 (citing Debra A. DeBruin, *Identifying Sexual Harassment: The Reasonable Woman Standard*, in *VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES* 107–22 (Stanley G. French, Wanda Teays, and Laura M. Purdy ed., Cornell University Press 1998)); FORELL AND MATTHEWS, *A LAW OF HER OWN*).

<sup>105</sup> *Id.*; see also BAER, WOMEN IN AMERICAN LAW, *supra* note 5, at 93 (suggesting that the law may need a "'reasonable victim' test to clarify that the viewpoint sought is not that of aggressors but that of their targets").

<sup>106</sup> CHAMALLAS, *Highlights*, *supra* note 59, at 334.

protection. The next issue was: how was this to be accomplished? Part III discusses the 1994 Amendments to the rape shield law, which were intended to afford alleged victims of sexual harassment protection from unnecessary embarrassment and to encourage victims to come forward and report sexual misconduct.

### III. UNDERSTANDING TODAY'S RAPE SHIELD LAW AND THE CIVIL EXCEPTION

Rule 412 was amended in 1994 to limit the admissibility of evidence in both criminal and civil cases.<sup>107</sup> The goals behind Rule 412 were again articulated and refined: "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details," and to encourage victims to institute and participate in legal proceedings against their offenders.<sup>108</sup>

Rule 412(a) places a general ban on evidence offered to prove other sexual behavior or sexual predisposition of any alleged victim in a civil or criminal suit involving sexual misconduct.<sup>109</sup> Rule 412 only applies in proceedings that involve alleged sexual misconduct, and does not exclude this type of evidence in other cases.<sup>110</sup> Furthermore, section (a) of Rule 412 broadly bars evidence relating to sexual behavior or sexual predisposition—subject to the exceptions outlined in section (b) of the Rule—as opposed to prohibiting evidence that has been offered for a particular purpose.<sup>111</sup> This distinguishes Rule 412 from many of the other Federal Rules of Evidence.<sup>112</sup>

Rule 412 does not define any of its key terms, such as "sexual behavior" and "sexual predisposition."<sup>113</sup> However, "sexual behavior" has been

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<sup>107</sup> Pub.L. 103-322, § 40141(b), 108 Stat. 1919 (1994).

<sup>108</sup> See FED. R. EVID. 412 advisory committee's note.

<sup>109</sup> FED. R. EVID. 412(a).

<sup>110</sup> *Id.*; see MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 388 (explaining that, as a result, evidence regarding one's sexual history or sexual predisposition will not be barred in cases that do not involve sexual misconduct); FED. R. EVID. 412 advisory committee's notes (explaining that evidence of one's sexual history or sexual predisposition may be admissible, for example, in a defamation action that involves statements concerning sexual misconduct where the evidence is offered to show the allegedly defamatory statements were true).

<sup>111</sup> FED. R. EVID. 412.

<sup>112</sup> MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 389 (observing that "Rule 412 differs from almost every other rule in Article IV" because the majority of rules ban a particular type of evidence "only when offered to prove a specific fact").

<sup>113</sup> See *generally* FED. R. EVID. 412.

construed to include “activities that involve actual physical conduct”<sup>114</sup>—sexual intercourse,<sup>115</sup> sexual contact,<sup>116</sup> use of contraceptives,<sup>117</sup> birth of illegitimate child,<sup>118</sup> a venereal disease,<sup>119</sup> and activities of the mind, such as fantasies or dreams.<sup>120</sup> The Advisory Committee’s Note to Rule 412 also explains that the term “sexual predisposition” refers to evidence that may have a sexual connotation for the factfinder despite the absence of any direct reference to sexual activity.<sup>121</sup> Notably, the Advisory Committee continues on to state: “*unless the (b)(2) exception is satisfied*, evidence such as that relating to the alleged victim’s mode of dress, speech, or life-style will *not* be admissible.”<sup>122</sup>

Rule 412(b)(2) provides:

In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible *if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party*. Evidence of an alleged victim’s reputation is admissible only if it has been

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<sup>114</sup> FED. R. EVID. 412 advisory committee’s note.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *United States v. Galloway*, 937 F.2d 542, 552 (10th Cir. 1991).

<sup>118</sup> *United States v. One Feather*, 702 F.2d 736, 739 (8th Cir. 1983).

<sup>119</sup> *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986).

<sup>120</sup> *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1104 (9th Cir. 2002) (citing FED. R. EVID. 412 advisory committee’s note); *Wolak v. Spucci*, 217 F.3d 157, 160 (2d Cir. 2000) (explaining that “behavior” referred to in Rule 412 encompasses “activities of the mind, such as fantasies”).

<sup>121</sup> FED. R. EVID. 412 advisory committee’s note.

<sup>122</sup> *Id.* (emphasis in text added); see GOODE & WELLBORN, COURTROOM EVIDENCE, *supra* note 13, at 119 (explaining that Rule 412(a)(2) renders inadmissible—subject to the 412(b) exceptions—evidence offered to prove sexual predisposition of an alleged victim including an “alleged victim’s mode of dress, speech and life-style if offered for its sexual connotation”). Therefore, the Advisory Committee took a more restrictive evidentiary approach than the *Meritor* court who found that evidence of “a complainant’s sexually provocative speech or dress” is “obviously relevant.” *Meritor*, 477 U.S. at 69. See GOODE & WELLBORN, COURTROOM EVIDENCE, *supra* note 13, at 119 (explaining how Rule 412(a)(2)—subject to the exceptions under subsection (b)—makes evidence offered to prove sexual predisposition of an alleged victim inadmissible, which includes “mode of dress, speech and life-style”); *Ratts v. Bd. of County Comm’rs*, 189 F.R.D. 448, 451 (D. Kan. 1999) (clarifying that Rule 412 does not allow the admission of evidence intended to prove an alleged victim’s sexual predisposition, which “includes evidence that may express a sexual connotation (dress, speech, or lifestyle”).

placed in controversy by the alleged victim.<sup>123</sup>

A careful examination of Rule 412 is necessary here because the language is fairly ambiguous. Before a piece of evidence is admissible under the Rule 412(b)(2) exception, it must be admissible under *all* of the other Federal Rules of Evidence.<sup>124</sup> Rule 404 still applies—generally, evidence of a person's character is not admissible for the purpose of proving actions in conformity therewith.<sup>125</sup> Therefore, in sexual harassment proceedings, evidence of an alleged victim's sexual acts may not be offered to prove that she had the propensity to commit such sexual acts.<sup>126</sup>

Furthermore, Rule 412(b)(2) provides a strict balancing test for admitting evidence offered to prove sexual behavior or sexual propensity—such evidence is only admissible in civil proceedings if the probative value *substantially outweighs* the unfair prejudice to any party.<sup>127</sup> A comparison with the balancing test provided by Federal Rule of Evidence 403 (Rule 403) helps clarify the standard of admissibility under Rule 412(b)(2).<sup>128</sup> First, Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .”<sup>129</sup> Under Rule 403, a party opposing a certain piece of evidence has the burden of justifying why it should be excluded, and a judge may exercise his or her discretion to exclude or admit such evidence. However, under the Rule 412(b)(2) balancing test, the burden shifts to the proponent of the particular piece of evidence to prove its admissibility.<sup>130</sup>

Second, Rule 412(b)(2)'s standard of admissibility is more rigorous—the probative value of the evidence must *substantially* outweigh the prejudicial

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<sup>123</sup> FED. R. EVID. 412(b)(2) (emphasis in text added).

<sup>124</sup> *Id.*

<sup>125</sup> FED. R. EVID. 404(a)(3).

<sup>126</sup> See MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 384 (explaining litigants may not offer evidence of an alleged victim's sexual acts or reputation to prove propensity).

<sup>127</sup> See generally FED. R. EVID. 412(b)(2); see MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 392 (referring to this standard of admissibility as the “reverse 403 test”).

<sup>128</sup> See Monnin, *Proving Welcomeness*, *supra* note 34, at 1176 (arguing that the Advisory Committee made a rational choice when it chose to opt for a balancing test given that courts were “accustomed to its provisions” because Rule 403 also required a “comparison of probative quality and prejudicial impact”).

<sup>129</sup> FED. R. EVID. 403.

<sup>130</sup> See FED. R. EVID. 412 advisory committee's note; *B.K.B.*, 276 F.3d at 1104 (quoting the advisory committee's note); *Wolak*, 217 F.3d at 160 (explaining that Rule 412(b)(2) reverses the usual presumption of admissibility set forth in Rule 403).



effect.<sup>131</sup> Rule 403 only excludes a piece of evidence when the prejudicial effect substantially outweighs its probative value.<sup>132</sup> Rule 412(b)(2), however, will exclude a piece of evidence when the prejudicial effect is: substantially outweighed by the probative value; somewhat outweighed by the probative value; equals the probative value; and is somewhat less than the probative value.<sup>133</sup> Again, Rule 412(b)(2) will admit a piece of evidence only when its probative value substantially outweighs its prejudicial effect to any party.<sup>134</sup> Finally, the civil exception to Rule 412 closes by stating that evidence of a victim may only be admitted if the victim has put her reputation in controversy.<sup>135</sup>

Despite this presumption of inadmissibility in civil cases, admissibility under Rule 412 is nevertheless more restrictive in criminal cases.<sup>136</sup> The Advisory Committee's Note to Rule 412 explains that the reasons subdivision (b)(2) uses a balancing test rather than specific exceptions, as is used in subdivision (b)(1), is in-part because there is "recognition of the difficulty of foreseeing future developments in the law."<sup>137</sup> The Committee goes on to explain that "[g]reater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment."<sup>138</sup>

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<sup>131</sup> Klein, *Evidentiary Hurdles*, *supra* note 22, at 718 (explaining that Rule 412 creates a "presumption of inadmissibility" that may be rebutted by showing that the probative value of a piece of evidence substantially outweighs the potential prejudice from its introduction).

<sup>132</sup> See *B.K.B.*, 276 F.3d at 1104 (clarifying that the balancing test under Rule 412(b)(2) is more stringent than the one in Rule 403); MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 392 (explaining how the Rule 403 standard of admissibility differs from the Rule 609(b) standard of admissibility, which is very similar to the Rule 412(b)(2) standard). The language of Rule 609(b) provides, "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the *probative value* of the conviction . . . *substantially outweighs its prejudicial effect*." (emphasis added).

<sup>133</sup> MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 259.

<sup>134</sup> *Id.*

<sup>135</sup> FED. R. EVID. 412(b)(2); see FED. R. EVID. 412(b)(2) advisory committee's note (explaining that the victim may put her reputation into controversy without making a specific allegation in the pleading).

<sup>136</sup> Compare FED. R. EVID. 412(b)(1) with FED. R. EVID. 412(b)(2).

<sup>137</sup> FED. R. EVID. 412 advisory committee's note.

<sup>138</sup> *Id.* Whether or not the advisory committee's explanation is helpful seems debatable. Another reason why Rule 412 is more restrictive may be that in criminal cases, it is critical to encourage victims of violent crimes to come forward, report, and testify. Whereas in civil cases, although reporting is extremely important, it is not critical, and filing of discriminatory charges is voluntary. See *Dunegan*, 77 F. Supp. 2d at 1201.

Section (c) of Rule 412 outlines the procedure for determining the admissibility of a piece of evidence.<sup>139</sup> First, a party intending to offer evidence under one of the exceptions in subdivision (b) must file a written motion at least 14 days before trial.<sup>140</sup> The motion should both describe the piece of evidence and state its purpose for being admitted.<sup>141</sup> This motion is intended to provide notice to the court, opposing counsel, and the alleged victim.<sup>142</sup> The court does have some discretion and may allow the party intending to offer the evidence to deviate from these procedural requirements if "good cause requires a different time for filing or permits filing during trial."<sup>143</sup> This may arise in cases where the evidence did not become apparent until trial.<sup>144</sup>

Second, the court must conduct a "hearing in camera" at which it "afford[s] the victim and parties a right to attend and be heard" prior to admitting the evidence.<sup>145</sup> The "hearing in camera" refers to a secret and sealed proceeding, which is meant to assure that the purposes of Rule 412 are not undermined while a determination of admissibility is being made.<sup>146</sup>

Notably, section (c) of the rape shield law overlaps with Federal Rule of Civil Procedure 26 in the civil setting.<sup>147</sup> Rule 26 instructs parties in a civil

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<sup>139</sup> FED. R. EVID. 412(c).

<sup>140</sup> FED. R. EVID. 412(c)(1)(A).

<sup>141</sup> *Id.*

<sup>142</sup> FED. R. EVID. 412(c)(1)(B); *see* MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 142.

<sup>143</sup> FED. R. EVID. 412(c)(1)(A); FED. R. EVID. 412 advisory committee's note (explaining that a late motion may be permitted when a good cause is shown, and a court can make a determination as to whether a good cause has been shown by considering whether the evidence could not have been obtained at an earlier time through due diligence, and whether the evidence relates to a newly arisen issue in the case).

<sup>144</sup> FED. R. EVID. 412 advisory committee's note.

<sup>145</sup> FED. R. EVID. 412 (c)(2).

<sup>146</sup> FED. R. EVID. 412, advisory committee's note (instructing that all papers associated with a motion shall be kept and remain under seal during the course of trial and appellate proceedings in order to assure privacy of an alleged victim where there has been a determination that proffered evidence is not admissible, and where the hearing refers to matters that are not received, or are received in another form); 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann) (explaining that the purpose of the in camera hearing is twofold: first, to give "the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury," and second, to protect "the privacy of the rape victim in those instances when the court finds that evidence is inadmissible"); MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13 (explaining that Rule 412(c) procedures are meant to assure that the purpose of the rape shield law is not undermined during discovery).

<sup>147</sup> *See* FED. R. CIV. P. 26 (discussing the duty to disclose and general procedures governing discovery in civil cases).

case to make disclosures about witnesses and issues more than 14 days prior to trial.<sup>148</sup> The Advisory Committee's Note addresses this issue, and explains that the "procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26."<sup>149</sup> Thus, subsection (c) of Rule 412 is not meant to make it even more difficult for a victim to discover what information her opponent plans to use against her—the regular requirements of disclosure of information under Rule 26 apply as usual. The Advisory Committee's Note explains further that "[i]n order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) to protect the victim against unwarranted inquires and to ensure confidentiality."<sup>150</sup> Thus, Federal Rule of Civil Procedure 26 and the exercise of judicial discretion when necessary are intended to adequately protect the needs of victims in a sexual harassment case.

The Rule 412(b)(2) balancing test makes sense in theory, but does it work in practice? Part IV discusses how courts have used the balancing test to admit and exclude evidence of alleged victims' sexual behavior or sexual predisposition.

#### IV. EXAMINATION OF THE POST-1994 AMENDMENTS CASE LAW

After the 1994 Amendments to the rape shield law, courts could no longer rely on an enormous body of federal case law.<sup>151</sup> The new standard was more precise—evidence being offered to prove an alleged victim's sexual predisposition or other sexual behavior was no longer admissible unless its probative value substantially outweighed the danger of harm or

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<sup>148</sup> FED. R. CIV. P. 26. Under subsection (a)(1)(C) of Rule 26—the revised rule, effective as of December 1, 2007—"[a] party must make the initial disclosure at or within 14 days after the parties' Rule 26(f) conference." Thus, parties in civil cases have to make disclosure about witnesses and issues more than fourteen days before trial. The reason subsection (c) of 412 is necessary in addition to Rule 26 of Civil Procedure is because in a criminal case there is little pretrial discovery. As a result, subsection (c) provides the judge with notice and a secret and sealed proceeding to review confidential evidence.

<sup>149</sup> FED. R. EVID. 412, advisory committee's note.

<sup>150</sup> *Id.* Section (c) of Rule 26 discusses protective orders: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

<sup>151</sup> *See, e.g.,* Barta v. City County of Honolulu, 169 F.R.D. 132, 136 (D. Haw. 1996) (rejecting defendants request to rely on two cases to support their argument because both rulings pre-dated the 1994 Amendments to Rule 412).

unfair prejudice.<sup>152</sup> Judges could no longer make a simple determination as to whether or not a piece of evidence was relevant to welcomeness. Rather, the requirements of Rule 412(b)(2) had to be satisfied before a piece of evidence could be offered to prove the sexual predisposition or behavior of an alleged victim. This Part surveys how courts have interpreted the Rule 412(b)(2) balancing test, how they have used the test to either exclude or admit evidence, and whether their reasons for doing so have been sound.

*A. Courts That Have Excluded Evidence of an Alleged Victim's Past Sexual Behavior or Sexual Predisposition*

Stated simply, Rule 412(b)(2) excludes evidence offered to prove sexual behavior or predisposition of an alleged victim unless the probative value of the evidence substantially outweighs any prejudicial effect.<sup>153</sup> After the 1994 amendments to Rule 412, a handful of courts have applied the Rule 412(b)(2) balancing test and excluded such evidence.

For example, in one such hostile environment sexual harassment case, a plaintiff sought a new trial after the defendant (her supervisor) had been allowed to present evidence regarding her sexual propensity to support his theory that his conduct was welcomed.<sup>154</sup> The plaintiff alleged that her supervisor made certain sexual comments to her that had created a hostile working environment and that ultimately compelled her to resign from the job.<sup>155</sup> The plaintiff additionally offered evidence showing that the supervisor had sexually harassed another employee.<sup>156</sup>

The Court discussed whether Rule 412 prohibited or limited testimony regarding personal, sexual matters that the plaintiff spoke with her female co-workers.<sup>157</sup> The defendant had offered this testimony as evidence that the plaintiff had invited the crass, sexual comments from her supervisor.<sup>158</sup> He had also failed to move for leave of the court to offer such evidence, and as a result, failed to comply with the procedural requirements under Rule 412(c).<sup>159</sup> Throughout the proceeding, the defendant argued that Rule 412 did

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<sup>152</sup> FED. R. EVID. 412(b)(2).

<sup>153</sup> FED. R. EVID. 412(b)(2).

<sup>154</sup> *Socks-Brunot v. Hirschvogel Inc.*, 184 F.R.D. 113, 115 (S.D. Ohio 1999).

<sup>155</sup> *Id.* at 116–17 (listing the harassing comments which included inquiries regarding: the size of the plaintiff's breasts; the type of condoms the plaintiff used; whether she would sit on his lap; the length of time that the plaintiff could “not go without sex”; and the fact other coworker wanted to have sexual relations with her).

<sup>156</sup> *Id.* at 116.

<sup>157</sup> *Id.* at 117.

<sup>158</sup> *Id.* at 117, 121–24.

<sup>159</sup> *Id.* at 119.

not apply to this evidence relating to “unwelcomeness” because this particular evidence—that the plaintiff had discussed sexual conduct with her female coworkers—did not amount to evidence of sexual predisposition or behavior.<sup>160</sup>

The Court rejected the defendant’s argument and held that Rule 412 did apply when discussing the admissibility of evidence about instances of prior sexual speech in civil cases involving sexual harassment.<sup>161</sup> The reasoning was articulated as follows:

Generally, evidence admissible for one purpose but inadmissible for another may be heard by a jury pursuant to Federal Rule of Evidence 105. The general rule is inapplicable with regard to evidence covered by Rule 412. . . . the Rule also provides a fundamentally different balancing test as to admissibility than that provided by the general relevance standard found in Federal Rule of Evidence 403.<sup>162</sup>

Testimony regarding conversations that the plaintiff had with another female co-worker regarding oral sex had been elicited during the first trial.<sup>163</sup> The Court concluded that this evidence should have been excluded prior to trial, reasoning that the “probative value of such testimony is nil [and] . . . [the] prejudicial effect is clear.”<sup>164</sup> No evidence was presented that the supervisor was part of the conversation between the employees or even knew of the conversation.<sup>165</sup> In addition, evidence that the plaintiff flirted with her alleged harasser should have been considered and ruled upon prior to trial; however, even if it had been, it would not have met the Rule 412(b)(2) standard because its probative value was weak, while the prejudicial effect was strong.<sup>166</sup> Lastly, because the defendant offered

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<sup>160</sup> *Socks-Brunot*, 184 F.R.D. at 119. Apparently, confusion over when Rule 412 is applicable is more prevalent than one would expect. As recently as 2000, the Second Circuit held that the district court erred in concluding that Rule 412 did not even apply in a sexual harassment case: “We hold that Rule 412, which explicitly includes civil cases involving sexual misconduct encompasses sexual harassment lawsuits.” *Wolak*, 217 F.3d at 160.

<sup>161</sup> *Socks-Brunot*, 184 F.R.D. at 119 (“While relevant evidence is generally admissible under Federal Rule of Evidence 403, evidence subject to Rule 412 is presumptively inadmissible, even when offered to disprove ‘unwelcomeness’ in a sexual harassment case.”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 121–22.

<sup>164</sup> *Id.* at 122.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*; but see *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 856 (1st Cir. 1998) (upholding evidence that plaintiff’s marital status and moral character was

evidence that the plaintiff frequently used profanity in the workplace without any information regarding the context or meaning of the profane statements, it was also rendered inadmissible under a Rule 412(b)(2) balancing test.<sup>167</sup> The Court concluded that the admission of evidence as to the plaintiff's workplace conversations with female coworkers had been an error, and granted the plaintiff's motion for a new trial.<sup>168</sup>

The Ninth Circuit Court of Appeals also applied the Rule 412(b)(2) balancing test to exclude evidence in *B.K.B. v. Maui Police Dept.* and found that the lower court's violation of the Rule could not be cured by an instruction, and instead required a reversal and new trial.<sup>169</sup> The plaintiff, who was a police officer, alleged that the Deputy Chief of Police had repeatedly harassed her and raped her on three occasions.<sup>170</sup> Furthermore, several other women testified about incidents of sexual harassment with the same Deputy Chief.<sup>171</sup>

Counsel for the defendant argued that the plaintiff had been faking, her testimony was inconsistent, and that she enjoyed the Deputy Chief's attention.<sup>172</sup> While the Deputy Chief admitted to having intercourse with the plaintiff on two occasions, he contended that the encounters had been consensual.<sup>173</sup> The potential Rule 412 violation occurred when the defense counsel presented evidence from an officer at the station, one of the

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inadmissible under the rape shield law, but evidence that the plaintiff had allegedly flirted with her alleged harasser was admissible to determine welcomeness).

<sup>167</sup> *Socks-Brunot*, 184 F.R.D. at 122–24 (“The context and meaning of such profane statements should have been thoroughly explored in a pretrial setting.”); see *Sheffield v. Hilltop Sand & Gravel Co.*, 895 F. Supp. 105, 108 (E.D. Va. 1995) (holding that evidence alleging that plaintiff used vulgar speech is most certainly evidence regarding her sexual predisposition and is therefore covered by Rule 412).

<sup>168</sup> *Socks-Brunot*, 184 F.R.D. at 120, 124 (finding that “a great deal of highly prejudicial, personally invasive, and legally irrelevant evidence” had been heard by the jury).

<sup>169</sup> 276 F.3d 1091, 1091 (9th Cir. 2002).

<sup>170</sup> *Id.* at 1096. The allegations included that the Deputy Chief had come to the plaintiff's home, threatened her, raped her, and warned her that no one would believe her if she told because he was the owner of the company, and she was just a woman. He told her that her career would be over if she reported him. On one particular instance, the plaintiff alleged that the Deputy Chief appeared at her home and raped her in front of her child. Additionally, around the same time period, allegations of sexual harassment against the Deputy Chief from several other women appeared in the press. Furthermore, the plaintiff estimated that she had been subject to racial remarks daily and to sexual comments on an average of two out of every three days.

<sup>171</sup> *Id.* at 1097, n. 4.

<sup>172</sup> *Id.* at 1097.

<sup>173</sup> *Id.*

plaintiff's coworkers.<sup>174</sup> The officer testified that following a party at the plaintiff's house, he and another officer had been too intoxicated to drive home and decided to spend the night.<sup>175</sup> Notably, the Deputy Chief was not present.<sup>176</sup> When defense counsel proceeded to ask whether "anything unusual had happened that night," plaintiff's counsel requested a short sidebar with the trial judge.<sup>177</sup> After the defense counsel confirmed that the testimony would not be about any sexual acts between the officer and the plaintiff, the trial judge allowed the testimony to proceed.<sup>178</sup> Nonetheless, immediately thereafter, the officer testified regarding the plaintiff's alleged sexual behavior during the remainder of the night.<sup>179</sup>

The next morning, plaintiff's counsel moved for a mistrial, and although the judge believed that the testimony "was harmful" and stated, "I think this was a violation of Rule 412," he declined to grant a mistrial.<sup>180</sup> The judge instead provided a curative instruction and partial striking of the officer's testimony.<sup>181</sup> The Ninth Circuit reversed and remanded for a new trial, reasoning that defense counsel ignored the procedural guidelines outlined in Rule 412(c), and "instead simply sprang the offending testimony upon the court and then misrepresented the nature of [the officer's] testimony to the trial judge in response to the plaintiff's objections."<sup>182</sup> The plaintiff's alleged statements about her sexual habits were not probative in relation to the alleged sexual harassment by her coworkers.<sup>183</sup> The curative instruction was

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<sup>174</sup> *Id.* at 1097–98.

<sup>175</sup> *B.K.B.*, 276 F.3d at 1097–98.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1098.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* The officer testified that the plaintiff "turned the conversation to sex," plaintiff's counsel objected, and the district court judge overruled. *Id.* The officer testified about the plaintiff's sexual behavior and how she modeled lingerie in front of him. *Id.* He claimed to have been "flabbergasted" and wanted to leave immediately, but he fell asleep instead. *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *B.K.B.*, 276 F.3d at 1098. The trial court judge even stated: "I am certain that the jurors paid a lot of attention to this testimony. I am certain they haven't forgotten it." *Id.* Nevertheless, he chose not to declare a mistrial because he did not believe the mistake warranted "such a severe sanction." *Id.*

<sup>182</sup> *Id.* at 1104–06.

<sup>183</sup> *Id.* at 1105; see *Wolak*, 217 F.3d at 160–61 (holding that defendants did not meet the requirements under the Rule 412(b)(2) test when they had attempted to introduce evidence that a plaintiff had viewed pornography outside of the workplace); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1001 (10th Cir. 1996) (finding that a "person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment"); *Saffa v. Oklahoma*

not an adequate remedy under such circumstances.<sup>184</sup>

Moreover, at least one court excluded evidence even when, debatably, the probative value may have substantially outweighed the prejudicial effect. In *Excel Corp. v. Bosley*, a former employee sued her former employer, alleging that her ex-husband harassed her at work.<sup>185</sup> On appeal, the employer argued that evidence of sexual relations between the plaintiff and her ex-husband was admissible pursuant to Rule 412—that the probative value did substantially outweigh the prejudicial effect.<sup>186</sup> Allegedly, the sexual relations had been taking place outside of the workplace, but simultaneously with the complained-of sexual harassment.<sup>187</sup> Nevertheless, reviewing for abuse of discretion, the Eighth Circuit concluded that the district court had not “manifestly erred” in refusing to admit this testimony regarding sexual relations between the plaintiff and her alleged harasser which occurred outside of the workplace.<sup>188</sup>

Notably, while in the cases discussed above courts were allowing less evidence in about a plaintiff’s past sexual behavior or predisposition, some courts were simultaneously expanding the situation that would support a sexual harassment claim. A few courts even concluded that a cause of action may lie for sexual harassment that does not fall neatly into the *quid pro quo*

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*Oncology, Inc.*, 405 F. Supp. 2d 1280, 1285 (N.D. Okla. 2005) (holding that evidence of plaintiff’s four month consensual sexual relationship with a doctor who was not a party to the lawsuit and which had occurred five years prior, was not relevant or probative); *Chamblee v. Harris & Harris, Inc.* 154 F. Supp. 2d 670, 679 (S.D. N.Y. 2001) (excluding evidence that plaintiff was a call girl/escort prior to her employment with the defendant); *Barta*, 169 F.R.D. at 136 (prohibiting defendants from inquiring into a plaintiff’s sexual conduct when it did not involve conduct with the defendants, and it occurred when she was off-duty and outside of the workplace).

<sup>184</sup> *B.K.B.*, 276 F.3d at 1105.

<sup>185</sup> 165 F.3d 635, 637–38 (8th Cir. 1999). She alleged that at various times at the workplace, her ex-husband called her a “bitch,” “slut,” or “whore” while other coworkers were present. *Id.* at 638. He also threatened to kill her boyfriend at the time (later, her husband). *Id.*

<sup>186</sup> *Id.* at 640–41.

<sup>187</sup> *Id.* In addition to the ex-husband’s testimony about this matter, the employer also sought to offer testimony from a clinical psychologist who testified that he had met with the ex-husband once alone and with both plaintiff and ex-husband once as well. *Id.* When he met with the ex-husband alone, he “told him [the plaintiff] was giving him ambiguous signals and that [she] occasionally slept with him.” *Id.*

<sup>188</sup> *Id.* at 641. The *Excel Corp.* Court carefully articulated why they chose to affirm the lower court’s decision: “Assuming, without deciding, that Rule 412 is applicable to the evidence proffered in this case, we cannot find that the district court abused its discretion. . . . The evidence in the record does not support a finding that the district court manifestly erred in refusing to admit the offered testimony.” *Id.*



or hostile environment discrimination categories.<sup>189</sup> The court in *Ellison v. Brady* found that misconduct by one employee of the IRS toward another coworker, which consisted of sending the coworker love notes and letters, was sufficiently severe and pervasive to constitute a hostile working environment.<sup>190</sup> A “reasonable woman” standard was adopted because “we [the Ninth Circuit] believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”<sup>191</sup> A reasonable woman could have considered the employee’s conduct sufficiently severe to create an abusive working environment, and the victim really had no way of “knowing what Gray [the employee] would do next.”<sup>192</sup>

In each of the decisions discussed above, the courts construed the Rule 412(b)(2) balancing test as a presumption of inadmissibility. They required that a specific showing be made that the probative value of the certain piece of evidence *substantially outweighs* the prejudicial effect to any party. Thus, with perhaps the exception of the *Excel Corp.* Court—where the issue of admissibility was somewhat complicated by the ongoing marital spat<sup>193</sup>—these courts have seemingly successfully applied the Rule 412(b)(2)

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<sup>189</sup> See generally *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Hall*, 842 F.2d at 1012, 1014 (8th Cir. 1988) (declining to hold that to be illegal under Title VII, sexual harassment must “take the form of sexual advances or of other incidents with clearly sexual overtones” and finding that verbal abuse, unwelcomed physical touching, and other forms of abuse including being “moonied” by male employees constituted sexual harassment); *Hicks v. Gates Ruler Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (considering evidence of threats of physical violence and abusive language as relevant in a sexual harassment claim).

<sup>190</sup> 924 F.2d at 874–76. The employee gave the plaintiff a note written on a telephone message slip that stated: “I cried over you last night and I’m totally drained today.” *Id.* at 874. The employee also mailed her a typed, single-spaced, three page letter that stated in part: “I know that you are worth knowing with or without sex. . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away.” *Id.*

<sup>191</sup> *Id.* at 879; see also CHAMALLAS, INTRODUCTION, *supra* note 80, at 244 (explaining that a “reasonable woman” standard was necessary here because “unless the judge took account of Ellison’s [the victim’s] social position as a woman trying to establish her credentials as a competent worker, he might miss the danger lurking behind Gray’s professions of love”).

<sup>192</sup> *Ellison*, 924 F.2d at 880.

<sup>193</sup> *Id.* The concurring judge in that case expressed that he was troubled by that fact that personal animosity arising from a failed relationship here did not necessarily equate to sexual harassment. *Id.* (Loken, J., concurring). He explained as follows: “When a marital spat spills over to the work place, it may produce misconduct that is not motivated by unlawful sex discrimination, even though that same misconduct between unrelated co-workers of the opposite sex would quite properly be the basis for inferring such discrimination.” *Id.*

balancing test in practice as it was intended to be applied in theory. For example, *Socks-Brunot* Court recognized that the Rule 412(b)(2) test was “fundamentally different” than the Rule 403 test, and consequently, the evidence in question was excluded.<sup>194</sup> The following section analyzes opinions where courts have used the Rule 412 test to admit evidence of the a plaintiff’s past sexual behavior or predisposition and discusses whether or not they have been as successful.

### *B. Courts That Have Admitted Evidence of an Alleged Victim’s Past Sexual Behavior or Sexual Predisposition*

While a number of courts have excluded evidence of a plaintiff’s past sexual behavior or predisposition under the Rule 412(b)(2) balancing test, some courts have applied the test and admitted evidence of an alleged victim’s past sexual behavior or predisposition. These courts must have made a specific finding that the probative value of the evidence *substantially outweighed* any prejudicial effect to the victim or any other party if they applied the Rule 412(b)(2) balancing test correctly. The following survey of relevant case law reveals that some courts have incorrectly applied this Rule 412(b)(2) standard.<sup>195</sup>

In *Wilson v. City of Des Moines*, the Eighth Circuit affirmed a trial court’s judgment for a city employer and denied an employee’s motion for a new trial, finding that there had been no showing of a clear and prejudicial abuse of discretion.<sup>196</sup> On appeal, the plaintiff, Mary Wilson, challenged the trial court’s holding on specific evidentiary grounds: (1) refusal to admit testimony by her fellow co-worker, on hearsay grounds, who would have testified that he was aware other co-workers called Wilson a “bitch, cunt and slut”;<sup>197</sup> and (2) admission of testimony by her harasser that Wilson made sexually-charged comments in the workplace and of testimony by a coworker that she spoke in “a lewd, rude and unlady-like fashion.”<sup>198</sup>

Addressing Wilson’s first contention, the Eighth Circuit observed that while the trial court had sustained the City’s hearsay objection and excluded

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<sup>194</sup> *Socks-Brunot*, 184 F.R.D at 119.

<sup>195</sup> One court even misstated the Rule 412 standard by omitting the “substantially outweighs” language. *See, e.g., Boeser v. Sharp*, Civil Action No. 03-cv-00031-WDM-MEH, 2007 WL 1430100 (D. Colo. May 14, 2007) (“However, in a civil case, such evidence [of a plaintiff’s sexual behavior or sexual predisposition] may be admissible if it is otherwise admissible and its probative value outweighs the danger of harm and of unfair prejudice.”).

<sup>196</sup> 442 F.3d 637, 645 (8th Cir. 2006).

<sup>197</sup> *Id.* at 640.

<sup>198</sup> *Id.*

the evidence that Wilson had been called a “bitch, cunt and slut” by other coworkers, the trial court did later concede, in its order on Wilson’s motion for a new trial, that its ruling on this issue may have been incorrect because the statements had not been offered for the truth of the matter asserted, but rather to prove general workplace hostility towards Wilson.<sup>199</sup> The Eighth Circuit agreed that the statements were not hearsay, but nevertheless found no abuse of discretion by the lower court and that “[t]he erroneous ruling was not prejudicial to [Wilson].”<sup>200</sup>

The Court confronted the second issue—whether a new trial should be granted on grounds that testimony by Wilson’s coworkers regarding sexually-charged comments she made at work was improperly admitted.<sup>201</sup> Wilson argued the testimony had been improperly admitted because the trial court failed to characterize the testimony as Rule 412 evidence and neglected to hold a hearing and follow the necessary procedural requirements under subsection (c) of Rule 412.<sup>202</sup> The Eighth Circuit responded to Wilson’s argument, “While we agree that the district court erred in mischaracterizing this evidence as non-Rule 412 evidence in the first instance, there was no danger of harm or prejudice to Wilson or any other party. . . .” and furthermore, “the failure to follow the procedural requirements under Rule 412 was harmless.”<sup>203</sup>

There appear to be inherent inconsistencies in the reasoning set forth in the *Wilson* opinion: the exclusion of evidence that the plaintiff’s coworker had called her sexually-charged, crude language was “not prejudicial to her,”<sup>204</sup> but the incorrect admission of evidence regarding the plaintiff’s so-called “unlady-like language”<sup>205</sup> was “harmless,” despite the fact that the procedural requirements of Rule 412 were violated.<sup>206</sup>

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<sup>199</sup> *Id.* at 641.

<sup>200</sup> *Id.* Wilson argued that the exclusion of the evidence was highly prejudicial and that “its rejection limited her ability to prove the severity and pervasiveness of the harassment.” *Id.* The Eighth Circuit simply responded by stating, “We do not share Wilson’s conviction. The words spoken by Wilson’s coworkers do not add as much as Wilson claims.” *Id.*

<sup>201</sup> *Id.* at 642–44.

<sup>202</sup> *Wilson*, 442 F.3d at 642–43. Again, subsection (c)(1) requires a party intending to offer Rule 412 evidence to file a written motion at least 14 days before trial, and subsection (c)(2) requires the court to conduct an in camera hearing to determine whether such evidence should be admitted. FED. R. EVID. 412(c).

<sup>203</sup> *Wilson*, 442 F.3d at 643–44.

<sup>204</sup> *Id.* at 641.

<sup>205</sup> *Id.* at 643.

<sup>206</sup> *Id.* at 644.

Furthermore, courts have also had difficulty applying the balancing test when determining whether deposition questions posed by defense counsel are “reasonably calculated to lead to the discovery of admissible evidence.”<sup>207</sup> For example, in *Ratts v. Bd. of County Comm’rs*, the plaintiffs—a former city airport employee (the alleged victim) and her husband—brought sexual harassment, unlawful retaliation, discrimination, and loss of consortium claims against the alleged victim’s former employer.<sup>208</sup> The plaintiffs filed a motion requesting a protective order concerning certain inquiries into the alleged victim’s past sexual conversations and sexual activity.<sup>209</sup> Although generally, Federal Rule of Civil Procedure 26 applies in the context of depositions, Rule 412 applies as well, because it governs the admissibility of evidence of the alleged victim’s sexual behavior and predisposition.<sup>210</sup> Therefore, the Court attempted to review each question and apply the Rule 412(b)(2) balancing test.<sup>211</sup>

Surely this was a daunting and tedious task, but it is nevertheless difficult to discern how the court decided that some questions were “reasonably calculated to lead to the discovery of admissible evidence and the probative value of the proposed discovery substantially outweighs the invasion of the plaintiff’s privacy and/or danger of harm to the plaintiff,”<sup>212</sup> while other questions were “not reasonably calculated to lead to the discovery of admissible evidence.”<sup>213</sup> For example, the *Ratts* Court overruled the plaintiff’s motion for protective order as to the following question: “Did Bob [alleged harasser] ever tell you that even if you took all your clothes off and

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<sup>207</sup> See, e.g., *Ratts*, 189 F.R.D. at 452–56.

<sup>208</sup> *Id.* at 449. After the deposition stage of this case, the defendants moved for summary judgment, which was granted in part and denied in part. *Ratts v. Bd. of County Comm’rs*, 141 F. Supp.2d 1289, 1326 (D. Kan. 2001). The Court found that the defendants were not entitled to summary judgment as a matter of law with regard to the former employee’s hostile work environment sexual harassment claim because her former supervisor had created a sexually charged environment. *Id.* at 1306. The alleged acts of harassment included, but were not limited to, nonconsensual sexual contact, exposure of genitalia, comments regarding masturbation, remarks suggesting that the plaintiff should wear a shorter dress and bend over, and comments about an intention to rape the plaintiff. *Id.* at 1300–01.

<sup>209</sup> *Ratts*, 189 F.R.D. at 450.

<sup>210</sup> *Id.* at 451 (citing FED. R. EVID. 412 advisory committee’s note); see *Sanchez*, 166 F.R.D. at 501–02 (explaining that although the motion at issue arose in the context of discovery under Rule 26 of the Federal Rules of Civil Procedure, “in order not to undermine the rationale of Rule 412,” it “is applicable and has significance” where the evidence concerns an alleged victim’s past sexual behavior or alleged sexual predisposition).

<sup>211</sup> *Ratts*, 189 F.R.D. at 452.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 454.

stood in front of him, he wouldn't touch you, or words to that effect? I know it's probably not a quote."<sup>214</sup> Then, the Court sustained the motion as to the following question: "Have you ever had any sexual physical contact with anyone at the workplace since August, 1979?"<sup>215</sup> It seems doubtful that the probative value of the answer to the former question would substantially outweigh the danger of harm to the alleged victim, especially where the defense counsel does not even know the exact language used by the alleged harasser. Furthermore, one could even question whether the plaintiff's answer to such a question would reveal any probative information about her sexual behavior or predisposition at all—rather, the question was about an embarrassing and uncomfortable statement the harasser allegedly made.

While the later question does seem overly broad, the probative value of the answer to that question seems greater than the probative value of the answer to the former question. The answer to that question could reveal information about the plaintiff's past sexual behavior or predisposition that's probative value substantially outweighs the danger of harm to any victim and of unfair prejudice, especially because the question was about the plaintiff's conduct at work. The *Ratts* Court did not have a consistent method by which to apply the Rule 412(b)(2) balancing test.

The next Part of this Note weighs the amended Rule 412's shortcomings—which were highlighted in this section—against its benefits, and forms a conclusion as to whether the 1994 Amendments to the rape shield law have accomplished their objectives. Part V also discusses whether the 1994 Amendments to the rape shield law have furthered the goals and policies of the Federal Rules of Evidence generally. Finally, Part V proposes some general guidelines for courts to follow when applying the Rule 412(b)(2) balancing test.

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<sup>214</sup> *Id.* at 453. Other notable instances where the Court overruled the plaintiff's motion included inquiry into sexual relations with men other than the defendants: "Did you tell Bob Maier [alleged harasser] that you had engaged in a sexual relationship with J.D. Ratts [former employee's husband] while on the airport property?"; "Did you tell Bob Maier about affairs and sexual relationships of Edye Leslie?"; and "Did you tell Bob Maier about an alleged affair of Terry Williams?" *Id.* at 453. The Court found "the probative value of the proposed discovery substantially outweigh[ed] the invasion of the plaintiffs' privacy and/or danger of harm to plaintiffs" where the husband of the former employee was asked, "With you sexually is she the aggressor?" and "In your relationship with your wife have you had occasion in which you've had sex with her in which she initially said no or didn't want to?" *Id.* at 455–56.

<sup>215</sup> *Id.* at 455.

## V. EFFECTIVENESS OF THE BALANCING TEST

Professor Martha Chamallas suggests that although sexual harassment laws have been enforced for over two decades, “the results are decidedly mixed.”<sup>216</sup> She argues that there has been a “change of consciousness”—sexual harassment is surely taken more seriously and is considered an infraction on an employee’s civil rights.<sup>217</sup> Even so, the law of sexual harassment has been unable to escape some of the negative influences of the law of rape, and often shifts focus onto the victim rather than the harasser.<sup>218</sup>

The underlying dilemma is that context matters.<sup>219</sup> Each case has its own specific set of facts. Undoubtedly, there will be certain circumstances where

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<sup>216</sup> CHAMALLAS, INTRODUCTION, *supra* note 80, at 238.

<sup>217</sup> *Id.*; see Fitzgerald, Schneider, & Swan, *Job-Related*, *supra* note 3, at 401 (noting that sexual harassment is “increasingly recognized as a stressor with serious consequences for employees and organizations” supported in part by the EEOC guidelines and the Clarence Thomas confirmation hearings); Joann S. Lublin, *Harassment Law In U.S. Is Strict, Foreigners Find*, WALL ST. J., May 15, 2006, at B1 (arguing that “American laws and customs relating to workplace sexual harassment are in many cases stricter than those abroad. . . . There are laws against employment discrimination in most industrialized countries, but U.S. harassment law holds employers to a high standard of preventing a ‘hostile workplace environment’”); Kate Stone Lombardi, *The New ‘Old Boys’?*, N.Y. TIMES, Jan. 20, 2008, at L1, *available at* 2008 WLNR 1124090 (explaining that in the 1970s, “‘sexual harassment’ was not yet in the public lexicon, at least not on Capitol Hill,” but today women enter a very “different world” where “[w]omen have now been firmly entrenched in the workplace for a full generation”).

<sup>218</sup> Fitzgerald, Schneider & Swan, at 401 (“The tendency to attribute causality to women’s ‘provocative’ dress or behavior and to credit myths about the motivations and credibility of complainants can sometimes make sexual harassment litigation look like the civil version of a rape trial.”); see *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1292 (8th Cir. 1997) (noting that before trial, defendants in a class action suit sought to discover extensive information regarding the plaintiff’s personal backgrounds, including: medical histories, childhood experiences, domestic abuse, abortion, and sexual relationships). Moreover, defense counsel will often argue a victim’s credibility should be questioned because she did not report the alleged misconduct soon after it occurred. See, e.g., *Matter of Discipline of Peters*, 428 N.W.2d 375, 376 (Minn. 1988). However, many women choose to just ignore the conduct, or change their own behavior in response to such misconduct. *Id.* at 376–77 (noting that victim of sexual harassment “began wearing more business-like clothing-suits and high-collared shirts—instead of the casual attire of many student researchers—because she wanted to make sure that she was not doing anything to encourage this type of behavior” and in response to her harasser’s conduct “she froze up, ignored the misconduct”); see *supra* notes 10–11 and accompanying text.

<sup>219</sup> See CHAMALLAS, INTRODUCTION, *supra* note 80, at 241 (arguing that it is not worthwhile to search for a certain “societal consensus” regarding what constitutes

the probative value of evidence regarding the plaintiff's past sexual behavior or sexual predisposition does in fact substantially outweigh the prejudicial effect to any party. Thus, it is necessary to have a flexible approach to appropriately distinguish between the evidence that is admissible and that which is not—hence, the Rule 412(b)(2) balancing test.<sup>220</sup> The Supreme Court has made clear that,

Of course . . . not all workplace conduct that may be described as “harassment” affects a “term, condition, or privilege” of employment within the meaning of Title VII. . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>221</sup>

Surely a standard that unequivocally categorizes even the slightest touch or a single crude joke as conduct that constitutes actionable sexual harassment would be undesired and unworkable in both daily life and the courtroom.

Moreover, Congress understood these issues prior to drafting the 1994 Amendments to Rule 412. The Rule was aimed to provide protection to alleged victims of sexual misconduct, in both criminal and civil cases, against “invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”<sup>222</sup> Congress realized this aim could not be accomplished at the expense of a defendant’s rights. Mindful of the *Meritor* unwelcomeness standard, the drafters understood that there would be instances where evidence of an alleged victim’s sexual behavior or predisposition would be extremely probative. Such evidence should be allowed when the probative value of the

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sexually provocative dress; rather, context will always be an element, particularly “the gender demographics and gender dynamics underlying the interactions”).

<sup>220</sup> FED. R. EVID. 412 advisory committee’s note (“[g]reater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (explaining that the test for whether an environment is “hostile” and “abusive” is not precise, but rather requires the court to look at the totality of the circumstances and factors such as “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance”).

<sup>221</sup> *Meritor*, 477 U.S. at 67.

<sup>222</sup> FED. R. EVID. 412 advisory committee’s note; 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann) (explaining that by allowing defense lawyers to bring out intimate details about a victim’s life, the evidentiary rules have permitted the introduction of evidence that “quite often serves no real purpose and only results in embarrassment”).

evidence substantially outweighs the prejudicial effect.<sup>223</sup>

Furthermore, Rule 412 promotes the policies and goals of the Federal Rules of Evidence generally. Federal Rule of Evidence 102 instructs that, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expenses and delay, and *promotion of growth and development of the law of evidence* to the end that the truth may be ascertained and proceedings justly determined."<sup>224</sup> The Federal Rules of Evidence were amended in 1994 as a direct response to the "growth and development of the law" of sexual harassment.<sup>225</sup> Rule 412 also discourages propensity (or character) evidence. The Federal Rules of Evidence generally discourage propensity evidence because its probative value is usually low, while its prejudicial effect is high.<sup>226</sup> Therefore, by encouraging both specific goals and the general goals of the Federal Rules of Evidence, the 1994 Amendments to the rape shield law have seemingly been successful—least in theory.

In this Note, the decisions discussed where courts have applied the Rule 412(b)(2) test properly and have used it to exclude evidence that is prejudicial to the plaintiff outnumber those decisions where courts have applied the test incorrectly.<sup>227</sup> Admittedly, this Note has only analyzed reported decisions, which are a small percentage of all judicial rulings. Furthermore, it is difficult to fully understand how an evidentiary rule works in practice without conducting empirical observations of trial records. Nevertheless, the preceding survey of case law undoubtedly reveals that federal courts act inconsistently when applying Rule.

Of course, a rule does not always work in practice as it is intended to work in theory. The problem does not appear to be the language in subsection (b)(2) of Rule 412. Balancing tests appear frequently throughout the Federal Rules of Evidence.<sup>228</sup> Rather, this inconsistency stems from the application of the Rule 412(b)(2) balancing test. Perhaps courts genuinely have difficulty applying balancing tests in the evidentiary context.

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<sup>223</sup> FED. R. EVID. 412(b)(2).

<sup>224</sup> FED. R. EVID. 102 (emphasis in text added).

<sup>225</sup> See *supra* Part II.A.

<sup>226</sup> See, e.g., FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."); *supra* note 31 and accompanying text.

<sup>227</sup> Compare *supra* Part IV.A with *supra* Part IV.B.

<sup>228</sup> See, e.g., FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."); FED. R. EVID. 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed . . . unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.").



Alternatively, some courts may still be adhering strictly to their pre-*Meritor*, pre-Rule 412 biases. Most likely, it is a combination of both of these problems that influence courts when they admit a piece of evidence that should have been excluded under Rule 412(b)(2).

How can courts, then, limit or prevent “decidedly mixed” results?<sup>229</sup> First, and most obviously, courts need to articulate and apply the correct test.<sup>230</sup> They need to understand how the Rule 412(b)(2) standard works, especially in relation to the other Federal Rules of Evidence. For example, the *Socks-Brunot* Court explained that the general rule under Federal Rule of Evidence 105 was inapplicable with regard to evidence covered under Rule 412, and that the Rule 412(b)(2) balancing test was “fundamentally different” than the Rule 403 balancing test.<sup>231</sup> Under Rule 403, a party opposing a certain piece of evidence has the burden of justifying why it should be excluded, and a judge may exercise his or her discretion to exclude or admit such evidence, while under the Rule 412(b)(2) balancing test, the burden shifts to the proponent of the particular piece of evidence to prove its admissibility. Also, Rule 412(b)(2)’s standard of admissibility is more rigorous—the probative value of the evidence must *substantially* outweigh the prejudicial effect. Rule 403 only excludes a piece of evidence when the prejudicial effect substantially outweighs its probative value.<sup>232</sup> Additionally, courts must remember that evidence is only admissible under Rule 412(b)(2) when it meets the balancing test *and* “if it is otherwise admissible under” the Federal Rules of Evidence.<sup>233</sup>

Second, rarely should evidence of a plaintiff’s prior sexual relationships that occurred outside of the workplace and with someone other than a defendant be admissible under the Rule 412(b)(2) balancing test. Allowing such evidence to be admitted regarding a victim’s private life, that has very little probative value, undermines the goals of Rule 412. Not only does the admission of such evidence embarrass the plaintiff, but it also allows the jury to make the very propensity argument that Rule 412 discourages—that because a woman engages in sexual activity in her private life, she welcomes such sexual behavior at the workplace. The Ninth Circuit Court of Appeals recognized this distinction in *B.K.B. v. Maui Police Dept.*, where it required a reversal and new trial after the trial court had allowed testimony about events

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<sup>229</sup> See *supra* note 216 and accompanying text.

<sup>230</sup> See, e.g., *Boeser v. Sharp*, Civil Action No. 03-cv-00031-WDM-MEH, 2007 WL 1430100 (D. Colo. May 14, 2007) (articulating the Rule 412(b)(2) standard incorrectly).

<sup>231</sup> *Socks-Brunot*, 184 F.R.D. at 119; see MERRITT & SIMMONS, *LEARNING EVIDENCE*, *supra* note 13, at 400 (explaining how the Rule 412(b)(2) standard differs from the Rule 403 standard).

<sup>232</sup> See *supra* note 131–135 and accompanying text.

<sup>233</sup> FED. R. EVID. 412(b)(2).

that had occurred in the privacy of the plaintiff's home, without the defendant present.<sup>234</sup>

Third, courts should scrutinize closely the context and meaning of profanities used in the workplace before such evidence is admitted.<sup>235</sup> Profanities rarely indicate welecomness, and there is much danger that a jury will invoke outdated stereotypes. For example, the requirements of the Rule 412(b)(2) balancing test were not met when the *Wilson* Court allowed a coworker to testify that the plaintiff spoke in a "lewd, rude and unlady-like fashion."<sup>236</sup> There was no inquiry as to when the plaintiff spoke in such a manner, what she said, or to whom the statements were made. Evidence of a plaintiff's use of profanities in the workplace should be admitted very rarely.

Finally, the most important thing for a court to do in a sexual harassment lawsuit when faced with a Rule 412(b)(2) issue is to follow the procedures set forth under subsection (c) of Rule 412—to make a thoughtful determination as to whether the probative value of a piece of evidence substantially outweighs its prejudicial effect. For example, if the lower court judge in *B.K.B. v. Maui Police Dept.* had carefully followed the Rule 412(c) procedures prior to admitting evidence about event that occurred in the privacy of the plaintiff's home, the Ninth Circuit would not have had to reverse the decision and require a new trial.<sup>237</sup> Courts save time when they correctly follow the procedures set for in Rule 412(c). If Rule 412, as amended, can function as the drafters intended it to, victims of sexual harassment will be able to report their harassers without fear of any undue invasion of privacy, embarrassment, or sexual stereotyping.

## VI. CONCLUSION

Even today, sexual harassment in the workplace is a prevalent and largely unreported problem. Research has shown that sexual harassment has serious, negative psychological effects on women in the workforce. Nevertheless, it was not until the 1978 that the United States Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*, declared that unwelcome sexual advances in the workplace which create a hostile working environment constituted sexual harassment and a viable cause of action under Title VII of the Civil Rights Act of 1964.

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<sup>234</sup> See *supra* note 169–184 and accompanying text.

<sup>235</sup> *Socks-Brunot*, 184 F.R.D. at 121–22 (explaining that evidence regarding statements a plaintiff made to another female coworker about oral sex were not highly probative).

<sup>236</sup> *Wilson*, 442 F.3d at 640, 643.

<sup>237</sup> See *supra* note 169–184 and accompanying text.

Furthermore, the *Meritor* Court held that the proper inquiry in a sexual harassment case is whether a plaintiff's conduct indicated that the alleged sexual misconduct or advances were unwelcomed. This standard shifts focus onto the victim, and makes evidence of her dress, sexual fantasies, and sexually provocative speech relevant. It is through this welcomeness standard that many defense attorneys successfully defend against sexual harassment suits, by arguing that the alleged harassment was welcomed by the plaintiff. In 1993, the Supreme Court delivered its next major opinion, *Harris v. Forklift Systems, Inc.* Justice O'Connor, writing for the Court, declared that while a plaintiff need not show that she suffered a mental breakdown or was harmed psychologically to have a valid sexual harassment cause of action, she did have to show that she subjectively perceived the environment to be abusive and that a reasonable person would have found the environment objectively hostile.

Federal Rule of Evidence 412 was amended in 1994 to limit the admissibility of evidence offered to prove the sexual behavior or predisposition of a civil plaintiff. Subsections (b)(2) of the Rule provides a balancing test, which states that evidence of a victim's sexual behavior or predisposition is only admissible if it is otherwise admissible under the Federal Rules of Evidence, and if there has been a specific finding that the probative value substantially outweighed the prejudicial effect to any party or harm to the victim. A survey of the post-1994 Amendment reported case law reveals that courts using the Rule 412(b)(2) balancing test to exclude highly prejudicial evidence against the plaintiff outnumber courts that have applied the test incorrectly. Nevertheless, for Rule 412 to accomplish its purpose, courts must uniformly apply the balancing test. Only then, will all victims of sexual harassment be protected from invasions of privacy, potential embarrassment, and sexual stereotyping.

This Note suggests four guidelines for courts to follow when faced with a Rule 412(b)(2) evidentiary issue. First, a court must articulate and apply the correct test. They must understand how the Rule 412(b)(2) balancing test differs from the Rule 403 balancing test, and how the other Federal Rules of Evidence apply when a particular piece of evidence falls within the scope of Rule 412. Second, courts should be tentative to admit evidence of a plaintiff's sexual relationships that occurred outside of the workplace and with someone other than a defendant. Rarely will this type of evidence be highly probative. Third, courts should scrutinize closely the context and meaning of profanities used in the workplace, and such evidence should rarely be admitted. Finally, and most importantly, courts must follow the procedural guidelines as set forth in Rule 412(c) and make a thoughtful determination as to whether the probative value of a piece of evidence truly *substantially* outweighs the prejudicial effect.

